De Visser, J. & November, J. (2017). Overseeing the overseers: assessing the compliance with municipal intervention rules in South Africa.
Hague Journal of the Rule of Law, 9: 109 – 133.
http://dx.doi.org/10.1007/s40803-016-0050-x

Overseeing the overseers: assessing compliance with municipal intervention rules in South Africa

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Abstract
Section 139 of the Constitution of South Africa empowers provinces to intervene into municipalities, an instrument to correct serious failures in local government. This article discusses the policy and legal framework for interventions and assesses whether the constitutional provisions that circumscribe it, are being adhered to. The starting point is that decentralisation, of which this instrument is part, is rules-based and that adherence to the rule of law is critical for its success. By its very nature, intervention represents an intrusion into the institutional integrity of the affected municipality and adherence to the constitutional safeguards surrounding the intervention is therefore critical. The article sets out the constitutional framework for interventions into municipalities which includes oversight roles for the Minister responsible for local government, the National Council of Provinces and the provincial legislature. It combines this with an assessment of 39 interventions that took place between 2008 and 2014. It presents a provincial breakdown and a breakdown of the legal basis of these 39 interventions. It concludes that provinces don't use the interventions envisaged in Section 139(4) and (5) but instead almost always intervene in terms of Section 139(1) of the Constitution. The interventions are assessed for compliance with constitutional prescripts, such as the need to establish a failure to fulfil an executive obligation, the timely submission of the intervention to the Minister and the NCOP and their timely approval. The article concludes that a significant number of interventions did not comply with the pro- visions pertaining to the timely submission and approval by the Minister and the NCOP. Furthermore, there is a need to accelerate the adoption of the legislation envisaged by Section 139(8) of the Constitution to further regulate interventions.

1 Introduction: Decentralisation and the Rule of Law

Any system of decentralised or multilevel government is shaped by the choices made in law on the extent of subnational autonomy and the scope for 'senior' governments to limit that autonomy. For example, the scope of functional and fiscal powers is an essential ingredient to determine the extent of the decentralisation and so is the question whether, and if so, when senior governments may take over subnational governments if they fail. Many of the crucial choices made with respect to shaping the system of decentralisation or multilevel government find their way into law. In countries where decentralisation or

multilevel government is embedded in the constitution, many of these basic rules will even take the form of constitutional provisions, further implemented in ordinary legislation. In countries where that is not the case, they will appear in ordinary legislation. In either scenario, the system of decentralisation or multilevel government cannot operate without adherence to the rule of law.[1] Subnational governments will assert autonomy on the back of constitutional or statutory rules pertaining to that autonomy and senior governments will exercise legislative or executive supervision, using rules from the same rule book. In both instances, this may happen against the will of the counterpart. The law is then crucial in determining limits to power. Decentralisation, or more broadly, multilevel government, is thus by definition a rules-based system. Compliance with those rules is an important determinant of the integrity of the decentralised or multilevel government system.[2] As Steytler remarks, 'the autonomous functioning of local governments is … bound up with the health of the national constitutionalism enterprise'.[3] If subnational governments exercise powers outside of what is legally permitted, this destabilises the division of powers, encroaches on the legal mandate of other parts of the state system and generally results in legal uncertainty and a loss of accountability. Similarly, if senior governments illegally encroach on whatever autonomy is granted to subnational governments, it undermines the vertical checks and balances inherent to that division. These are often a reflection of a state design based on critical choices on how to deepen democracy, stimulate development and manage diversity.[4]

This article examines a crucial aspect of South Africa's system of multilevel government, namely the powers of provincial governments to intervene into municipalities. It is therefore located in the rules that deal with the limits on local government autonomy (i.e. rules that permit provinces interfere with that autonomy) and in the rules that deal with the protection of local government autonomy (i.e. rules that limit provincial discretion to interfere with local government autonomy). It assesses the extent to which the 'senior' governments adhere to the rules when they resort to intervention. In doing so, it aims to make considered and evidence- based observations on the integrity and functionality of South Africa's system of multilevel government.

Before embarking on this inquiry, the article will first provide an overview of the system of local government, making the argument that decentralisation of powers to municipalities in South Africa is an integral part of South Africa's quest for development and the eradication of the pernicious legacy of apartheid. This will underscore the importance of the examination of the integrity of South Africa's system of decentralisation, including the rules for dealing with the abuse of autonomous power, namely intervention.

[1] Unqiao and Shah (2006), p. 165.
[2] See Hamann (2012), pp. 33–68, Bardhan and Mookherjee (2006).
[3] Steytler (2017), para. 4.2.
[4] See, for example Ayele (2014), Ch. 2.

2 Local Government in South Africa

South Africa's land mass spans 1,220,813 square kilometres inhabited by 52 million people. The Constitution follows a quasi-federal approach, establishing three 'spheres' of government, namely national government, nine provincial governments and local government. The local government system comprises 257 municipalities. Set off against the abovementioned size and population, this makes South Africa home to some of the world's largest local governments in terms of both area and population.

Before 1994, local government in South Africa was designed to implement apartheid. Local government institutions were racially determined and the black majority was denied democratic rights. White municipalities were self-serving entities; they were given exclusive power to tax properties in well-resourced and viable commercial centres without any obligation to use the revenue to improve the lives of township dwellers. Black municipalities were undemocratic and starved of income and authority. They became the subject of large scale service boycotts in the 1980s.[5] On the back of the release of Nelson Mandela and the negotiations towards a democratic South Africa, the 1993 Constitution introduced major reforms for local government. Local government was given constitutional recognition and the racially configured local government institutions were merged.[6] Even more fundamental change came with the 1996 Constitution, which further entrenched the role of local government. The new system was put into operation in 2000 and, at the time of writing it was thus only 16 years old. It now comprises democratically elected political leadership with constitutionally guaranteed authority over functional areas.

The Constitution also secures local government's authority with regard to certain important financial matters. It empowers municipalities to impose surcharges on fees for services provided and to impose property rates,[7] and entitles local government to an 'equitable' share of nationally generated revenue [8]

As an unequivocal response to the destructive role played by local government in the past, the Constitution posits local government as a sphere of government that is responsible for important developmental matters. The constitutional 'objects of local government' are to:

1. provide democratic and accountable government for local communities;
2. ensure provision of services to communities in a sustainable manner;
3. promote social and economic development;
4. promote a safe and healthy environment; and
5. encourage the involvement of communities and community organizations in the matters of local government.[9]

[5] Steytler and de Visser (2007), pp. 1–7.
[6] Steytler and de Visser (2007), pp. 1–10.
[7] Section 229 Constitution.
[8] Section 214 Constitution.
[9] Section 152 Constitution.

Municipalities are furthermore instructed to give priority to the basic needs of the community.[10] Municipalities are responsible for important services such as water and sanitation, municipal roads, refuse removal, electricity reticulation, environmental health services and town planning. Furthermore, they develop and maintain parks, recreational facilities, markets and local transport facilities. In addition to these constitutionally guaranteed functions, they often perform other functions including housing delivery, primary health care and community services such as libraries and museums. Taken together, these functions place local government at the epicentre of the much needed development in South Africa. Against the backdrop of the devastating effect of apartheid's policy to deliberately exploit and marginalise the black majority, municipalities thus play a crucial role in addressing the realities of service delivery backlogs, rural poverty, urban inequality and a range of other social ills bequeathed on democratic South Africa.

In that respect, the progress made to date is impressive. For example, the number of households with access to piped water rose from just over 9 Million in 1996 to almost 17 Million in 2016.[11] Access to electricity is now 85.4 and 66.0% of the population now has access to municipal refuse removal.[12] However, municipalities are fighting huge service delivery backlogs on the basis of a very precarious financial position. Communication and accountability relationships with communities are often poor and many municipalities experience internal governance problems and sometimes even corruption and fraud.[13] Financial management is too often inadequate, resulting in negative audit opinions issued by South Africa's Auditor-General whose task it is to audit the books of public institutions. In 2014 the then Minister of Cooperative Governance and Traditional Affairs, Pravin Gordhan, divided municipalities into three groups: a third of the municipalities were carrying out their tasks adequately; a third was just managing; and the last third was 'frankly dysfunctional'.[14]

Depending on the extent of the malfunction, municipal collapse has very serious consequences for communities living in the area. For example, it is not uncommon for a municipality to experience such degrees of political tension in its council that it is unable to meet and take crucial decisions, such as a budget. This paralyses the entire administration, delays key activities such as the maintenance service delivery infrastructure or much-needed investment in such infrastructure. The absence or inadequate provision of basic services, such as water, electricity, sewerage and solid waste disposal endangers public health and immediately compromises the dignity of those affected. In unequal South Africa, middle and high income citizens have the financial wherewithal to absorb a degree of municipal dysfunction by resorting to privately delivered services. However, the poor and marginalised rely exclusively on public provided services and have little or no resource to generators, private

[10] Section 153 Constitution.
[11] Statistics South Africa, Statistics South Africa Community Survey 2016, Statistical release P0301, p. 64.
[12] Statistics South Africa, Household Service Delivery Statistics (2015). ''http://www.statssa.gov.za/?page_id=739&id=2''. Accessed 13 October 2015.
[13] Department of Cooperative Governance and Traditional Affairs (2009).
[14] Troye Lund, 'Local Government Reform: Pravin's Big Challenge', Financial Mail, 11 December 2014.

bore holes, private security etc. Therefore, municipal failures disproportionally affect the poor and marginalised and thus seriously undercut South Africa's quest to reduce inequality.

3 Provincial Intervention in Municipalities

3.1 Introduction

South Africa's nine provinces are instructed by the Constitution to oversee municipalities to ensure the abovementioned scenarios are avoided at all cost. They do this in partnership with national government. The Constitution instructs national and provincial governments to 'support and strengthen the capacity of municipalities'.[15] This is reiterated in Section 155(6) of the Constitution where provincial governments are instructed to 'provide for the monitoring and support of local government' and to 'promote the development of local government capacity'.[16] It goes without saying that it is particularly the so-called 'dysfunctional' municipal- ities that require intensive national and provincial government monitoring and support. A comprehensive legal framework for monitoring legal compliance and performance of municipalities exists and national and provincial governments dedicate substantial resources in supporting municipalities in the form of advice, training, financial injections or the deployment of human resources. This is an integral part of South Africa's system of decentralisation.

The subject of this article is the instrument that can be resorted to when monitoring and support do not yield the required results. Section 139 of the Constitution sets out a framework in terms of which the provincial executive may intervene in a municipality. This article examines the legal framework and practice surrounding provincial interventions into municipalities in terms of Section 139(1) of the Constitution. In the 16 years since the coming into operation of the current system of local government these interventions have become a regular occurrence, as will be highlighted below. The most common scenario is one whereby the provincial government puts a municipality 'under administration' usually after prior attempts to assist were unsuccessful. Practically, the provincial government then appoints an administrator, usually a seasoned public administrator, who takes over the reins for a period that may last three to sometimes even 18 months. Depending on the precise mode of intervention (see below) the council would remain in office. However, its wings would be clipped in that the administrator exercises all executive powers. There is a considerable amount of literature about the legal framework for these interventions.[17] Furthermore, the national government has issued guidelines on the use of intervention on at least two occasions.[18] However, little has been written about the practice of these interventions. In the same vein, very few cases of interventions into local government have made it to the courts. This article seeks to make a contribution to filling that gap.

[15] Section 154(1) Constitution.
[16] Section 155(6) Constitution.
[17] See Steytler and de Visser (2007), Ch. 15, pp. 18–53; Hoffman-Wanderer and Murray (2007), p. 141; Murray (1999), p. 332; Murray and Hoffman-Wanderer (2007), p. 28; and Roos and Stander (2007), p. 166.
[18] Department of Provincial and Local Government (2000, 2007).

3.2 The Legal Framework for Interventions

The Constitution, together with the Local Government: Municipal Finance Management Act[19] essentially provides for four types of interventions. In very general terms, all four interventions respond to different degrees of malfunctioning in a municipality and empower the provincial executive to encroach on the autonomy of that municipality by instituting various corrective mechanisms.[20]

The first type of intervention can be referred to as the 'regular' intervention in terms of Section 139(1) of the Constitution. It provides for three instruments, namely the issuing of a directive by the provincial executive to the relevant municipal council, the assumption of responsibility and the dissolution of a municipal council. As will be highlighted later, it is this provision that forms the basis for the vast majority of interventions that take place in practice, namely the intervention that results in the municipality being put 'under administration'. The second intervention procedure can be applied in the case of serious financial problems and may include the imposition, by the provincial executive, of a financial recovery plan, the assumption of responsibility and the dissolution of the municipal council.[21] The third intervention is applied in response to a municipality that fails to approve a budget and includes measures such as the dissolution of the municipal council and the adoption of a temporary budget or revenue-raising measures.[22] The fourth intervention mechanism is used when a municipality experiences a crisis in its financial affairs and may include the imposition of a financial recovery plan, the dissolution of the municipal council and the assumption of responsibility.[23]

The decision by a provincial executive to intervene in a municipality is a serious encroachment on the autonomy of the municipality in question. This is why both the decision and its implementation are subject to a number of substantive and procedural requirements. The substantive requirements relate to questions such as under what circumstances that particular type of intervention may be invoked and what the scope of provincial authority is once the intervention is in place. The procedural requirements relate to the so-called 'intergovernmental checks and balances'. The Constitution subjects the provincial decision to intervene and the implementation of that decision to oversight by the national Minister responsible for local government.[24] Aside from being a check on provincial power, it is also a manifestation of the earlier principle, namely that overseeing municipalities is a task performed by provincial governments in partnership with national government. The Constitution also subjects the provincial decision to intervene to the approval of Parliament's second chamber, the National Council of Provinces (NCOP).[25] The NCOP, modelled on the German Bundesrat, comprises delegations of each of the nine

[19] Act 56 of 2003 ('MFMA').
[20] The distinction between the four interventions is further discussed in Steytler and de Visser (2007), pp. 15–18.
[21] Section 139(1) Constitution, read with Section 137 MFMA.
[22] Section 139(4) Constitution.
[23] Section 139(5) Constitution.
[24] Section 139(2) Constitution.
[25] Section 139(2) Constitution.

provinces.[26] It plays a muted role in national law making but has very pertinent powers to oversee the provincial exercise of intervention powers.

4 Assessing Interventions Between 2009 and 2014

4.1 Introduction

The remainder of this article is dedicated to the examination of the practice surrounding interventions. It looks specifically at compliance with the abovementioned substantive and procedural requirements over a period of 5 years, namely from January 2009 until March 2014. The aim is to provide insight into how provinces have applied the instrument of intervention and whether or not the various procedural and substantive requirements were adhered to. The analysis assesses compliance by the organs of state involved in the intervention, i.e. the provincial executive, the Minister of local government and the NCOP, to the laws and guidelines surrounding Section 139 interventions. The findings are important for a number of reasons. Firstly, any failure to adhere to any of the procedural or substantive requirements in Section 139 of the Constitution renders the intervention unlawful or at least subject to legal question. Secondly, Section 139(8) of the Constitution invites government to regulate the process of intervention further in an Act of Parliament. This legislation is not yet in place and the findings presented here may be relevant in that context.

4.2 Data and Methodology

As will be discussed below, the Minister and the NCOP must be informed of interventions in terms of Section 139(1)(b) and (c) of the Constitution. As a result of this notification requirement, these two organs of state are important repositories of information pertaining to each intervention. The research into the practice of interventions between 2009 and 2014 was conducted, using data obtained from the NCOP and from the Minister of Cooperative Governance and Traditional Affairs (CoGTA). The documents are official notices, letters and parliamentary reports pertaining to specific interventions. In addition, various discussion documents of CoGTA and the South African Local Government Association (SALGA), containing general assessments of intervention practices, were used for the research. In order to ensure accuracy, the consolidated data set was submitted to CoGTA for verification. All the above-mentioned data relates to interventions that took place between January 2009 and March 2014.

4.3 Provincial Breakdown of Interventions

In principle, it is only the provincial government that may invoke these intervention mechanisms. Section 139(7) of the Constitution provides that a failure on the part of a province to use the third or fourth intervention mechanism in appropriate circumstances empowers the national government to do so in its stead but this provision was never invoked by the national government during the period under review.[27] So while provincial governments often intervene in close consultation or sometimes even in collaboration with national government, the interventions are legally carried out by provincial governments.

[26] Section 60 Constitution.
[27] Section 139(7) Constitution.

The detailed analysis of interventions that will follow later in this article refers to the period January 2009 to March 2014. However, going back to January 1998 and counting the number of interventions until March 2014, it indicates that there were 72 interventions in total. This represents an overall average of five interventions per annum. Table 1 provides a provincial breakdown of the interventions between 1998 and 2014.

KwaZulu-Natal recorded the highest number of interventions, namely 18. Gauteng and Limpopo recorded the lowest number of interventions, namely one each. The differences among provinces must be interpreted against the backdrop of variation in the number of municipalities per province. For example, there are 61 municipalities in KwaZulu-Natal but only 15 in Gauteng. However, this does not fully explain the variation. The difference among provinces could also be linked to the degree of political tension in a specific province which may have spilled over into provincial and municipal government. For example, it is tempting to attribute the high number of interventions in the North West to the bitterly divided politics in that province.[28] However, there are also differences in approach across provincial governments with regard to whether intervention is an adequate instrument to address municipal failures. Given KwaZulu-Natal's relatively high number of interventions, it does seem that that province views the institution of Section 139 interventions as a useful mechanism while other provinces, such as Limpopo may be less inclined to resort to Section 139 interventions.

Table 1 Section 139 interventions (1998–2014) per province

Province	# interventions
KwaZulu-Natal	18
North West	15
Free State	10
Eastern Cape	10
Mpumalanga	10
Western Cape	5
Northern Cape	2
Gauteng	1
Limpopo	1
Total	72

Source: South African Local Government Association 2014, *Application of Sections 100 and 139 of the Constitution*

The enquiry now proceeds to a more detailed analysis of the 42 interventions that took place between January 2009 and March 2014. It looks at a number of aspects, namely –

[28] M. De Waal and T. Lekgowa, 'For Warring North West ANC Factions, Mangaung Is the Next Battlefield', Daily Maverick, 7 Dec 2012.

1. the legal basis of the intervention;
2. prior notice before the intervention;
3. use of a directive before any other intervention;
4. identifying the failure to fulfil an executive obligation;
5. timeframe for informing the Minister;
6. timeframe for informing the NCOP;
7. timeframe for the Minister to decide; and
8. timeframe for the NCOP to decide.

The applicable provisions with respect to each of those aspects are briefly introduced, followed by an overview of provincial practices in that regard.

4.4 Legal Basis Used for the Intervention

As indicated above, the legal framework provides for four different intervention procedures that may (or sometimes must) be applied in response to different degrees or manifestations of malfunction in a municipality. The first two interventions procedures are based on Section 139(1) of the Constitution, the third on Section 139(4) of the Constitution and the fourth on Section 139(5) of the Constitution. Between January 2009 and March 2014, a total number of 42 interventions took place. Table 2 provides a provincial breakdown and lists the constitutional provision that was relied upon to institute the intervention.

The overwhelming majority of interventions, namely 93%, were instituted under Section 139(1) of the Constitution. On only two occasions, Section 139(4) of the Constitution, which is specifically aimed at municipalities that fail to approve a budget or revenue-raising measures, was invoked. On only one occasion, Section 139(5) of the Constitution, which is specifically aimed at municipalities with a crisis in financial affairs, was invoked.

Given that the vast majority of interventions occur under Section 139(1) of the Constitution and to keep the discussion focused on actual practice, the remainder of this article will focus on this subsection and the legal framework for interventions under Section 139(4) and (5) will not be discussed further.

A closer analysis of the legal basis for the 39 interventions that were instituted in terms of Section 139(1) of the Constitution reveals that the overwhelming majority, namely 36 out of the 39 interventions, were 'assumptions of responsibility' in terms of Subsection 1(b). Two out of the 39 interventions were 'dissolutions' in terms of Subsection 1(c) and one intervention was a 'directive' instituted on the basis of Subsection 1(a).

The above two findings, namely that Sections 139(4) and (5) of the Constitution were hardly used and that Section 139(1)(b) Constitution is by far the most used intervention casts doubt on the utility of the changes to Section 139 of the Constitution that were inserted by the Constitution Eleven Amendment Act of 2003. Section 139(1)(b) of the Constitution, providing for the 'assumption of responsi- bility' for an executive obligation had always

been part of the menu of interventions; it has been listed in Section 139 since the adoption of the Constitution. In response to difficulties in implementing Section 139(1)(b) of the Constitution,[29] Parliament passed a range of amendments to the provision and added a further menu of interventions, namely those related to budget failures and financial crises as well as the dissolution of municipal councils. Subsection 139(1)(c) was added to enable provincial executives to dissolve errant municipal councils, an instrument which until then had a shaky legal basis. Subsections (4) and (5) were added, arguably to be able to deal more swiftly with municipalities in budgetary or financial trouble and to create an environment more conductive to municipal borrowing (providing investors with a certain legal framework for municipal borrowing). It is then remarkable that provincial executives made little or no use of the new intervention powers but instead relied on the 'tried and tested' Section 139(1)(b) intervention. This is despite the fact that the intergovernmental checks and balances, i.e. the approvals of the national Minister and the NCOP (see below), are less stringent with respect to interventions in terms of Section 139(4) and (5) of the Constitution compared to the intervention in terms of Section 139(1)(b) of the Constitution.

Turning to the assessment of how these interventions were implemented, the next aspect that will be examined is whether or not provincial executives sent the municipality a prior notice before instituting the intervention.

Table 2 Section 139 interventions from (2009–2014) per province and subsection invoked

Province	Subsection (1)	Subsection (4)	Subsection (5)	Total
KwaZulu-Natal	12			
North West	9			
Mpumalanga	7			
Eastern Cape	5			
Free State	4			
Western Cape	1	2		
Limpopo	1			
Gauteng			1	
Northern Cape	0			
Total	39	2	1	42

Source: South African Local Government Association 2014, *Application of Sections 100 and 139 of the Constitution*

4.5 Assessing Procedural Requirements Before the Decision to Intervene

4.5.1 Prior Notice Before an Intervention

The requirement of prior notice before a Section 139(1) intervention is instituted does not appear explicitly in Section 139(1) of the Constitution. However, it appears in the guidelines

[29] For a discussion of the background to the Constitution Eleven Amendment Act of 2003, see de Visser (2005), pp. 192–194.

issued by the national government.[30] The requirement of prior notice can also be argued on the basis of Section 41(1)(h)(iii) of the Constitution which requires organs of states in all spheres of government to 'inform one another of, and consult on matters of common interest'.[31] In Mnquma Local Municipality and Another v. Premier of the Eastern Cape and Others,[32] one of the few judgments dealing substantively with Section 139, the Eastern Cape High Court found the argument that the application of the principle of legality in the context of the provisions of Section 139(1) demands procedural fairness 'not without merit'.[33] The object of giving the municipality prior notice would be to inform it that an intervention is on the cards and to allow the municipality an opportunity to respond and/or to address the problems before an intervention becomes necessary.

A review of the 39 interventions that took place between 2009 and 2014 suggests that provincial executives seldom issue a prior notice, namely in only 8% of the interventions. In 87% of the interventions, it was clear that no prior notice was issued and in 5% of the cases it was not clear from the material whether or not a prior notice had been issued (see Fig. 1).

It thus seems that provincial governments that are preparing to institute a Section 139 intervention generally do not take the requirement of a formal prior notice seriously.

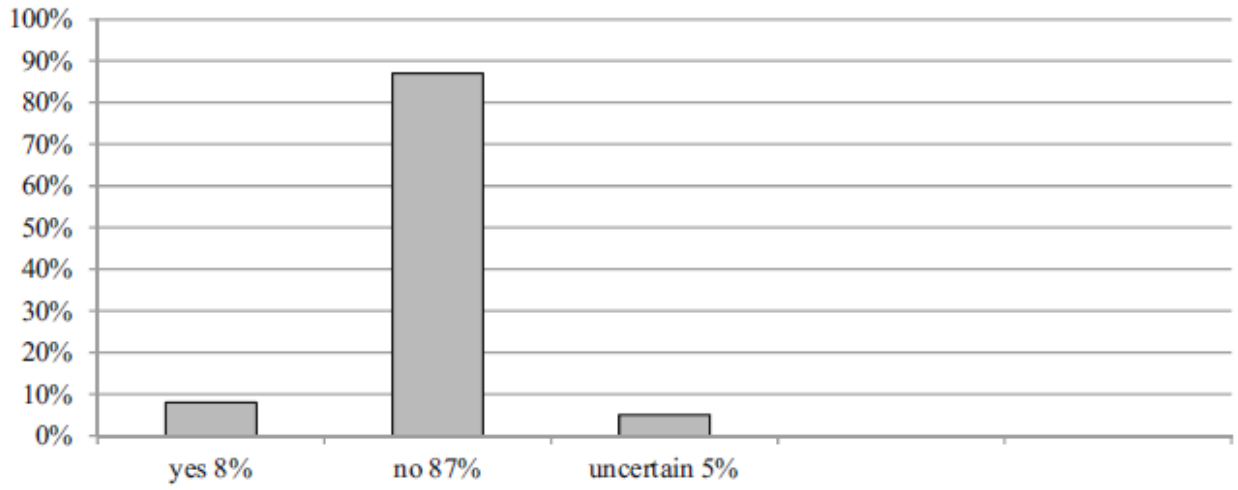

Fig. 1 Prior notice issued before intervention

This is despite the fact that there is considerable support in law and in the national government's guidelines that the issuing of a prior notice is a legal requirement. This must not be interpreted as providing evidence provinces are in the habit of springing interventions onto municipalities. The duty on the part of provinces to monitor and support municipalities, for which extensive programmes and institutional arrangements exist,

[30] Department of Provincial and Local Government (2000), at p. 22; Department of Provincial and Local Government (2007), at p. 18.
[31] Section 41(1)(h)(iii) Constitution. See also ss 41(1)(e) and (g) Constitution.
[32] [2009] ZAECBHC 14 ('Mnquma').
[33] Mnquma at para. 34.

means that in most cases the provincial government would have communicated comprehensively with the municipality in question about the problems that are giving rise to the intervention. Nevertheless, a distinction must be made between these monitoring and support activities and the formal, written notice that is placed on record and indicates that a Section 139 intervention is being considered. The latter does not seem to have taken root in provincial practice.

4.5.2 The Use of Section 139(1)(a) Directives

The second question that is examined relates to the use of directives in terms of Section 139(1)(a) of the Constitution. The background to this question is as follows. The provincial executive may take 'any appropriate step' in the context of Section 139(1) of the Constitution.[34] However, Section 139(1) of the Constitution does mention three steps in particular namely (1) the issuing of a directive, (2) the assumption of responsibility and (3) the dissolution of the council.

The issuing of a directive in terms of Section 139(1) of the Constitution is an intervention in its own right. It is an encroachment on the autonomy of the municipality in that the municipality is instructed to do something or refrain from doing something where it otherwise would have had the authority to make its own decision in that regard. This study could not examine whether or not the directive is being used in that way and what the impact of any such directives has been. A directive is, in essence, a communication between the provincial government and the municipality. The Constitution does not require the directive to be submitted to the national Minister responsible for local government or to the National Council of Provinces. Therefore, if the directive is 'successful' and the municipality addresses its problems in line with the intervention, the documentation pertaining to the directive is unlikely to feature in any information held by the NCOP or CoGTA. As this study is based on information held by the NCOP and CoGTA, this dimension to the use of the directive, namely as a fully-fledged intervention, could not be examined conclusively.

However, there has also been a debate in the literature and in the courts about the question as to whether the assumption of responsibility in terms of Subsection 139(1)(b) and the dissolution in terms of Subsection 139(1)(c) must be preceded by a directive in terms of Subsection 139(1)(a) of the Constitution.[35] In other words, the question is whether the directive is a precondition for other, more intrusive interventions. The guidelines issued by the national government suggest that, in principle, a directive must first be issued before any of the more intrusive interventions may be pursued.[36] The courts have adopted differing views on the issue. In Mnquma, the High Court held that the three interventions in Section 139(1) are alternative forms of intervention and that it is not necessary for the assumption of responsibility or the dissolution to always be preceded by a directive.[37]

[34] Mnquma at para. 67.
[35] See, for example, Steytler and de Visser (2007), pp. 15–22(1).
[36] Department of Provincial and Local Government (2000), at p. 21; Department of Provincial and Local Government (2007), at p. 17.
[37] Mnquma at para. 72.

However, in Mogalakwena Local Municipality v. Provincial Executive Council, Limpopo and Others,[38] the Court concluded differently when it stated that 'the proper construction of s 139(1) is that it depends on the facts' and that it 'lean[s] toward an interpretation that would require the province to issue a directive in a case such as the present'.[39]

The purpose of this article is not to offer a detailed view on which interpretation is correct but rather to assess what happens in practice. A review of the interventions that took place between January 2009 and March 2014 suggests that, in the vast majority of cases, no directive is issued. Figure 2 indicates that in only 8% of the 39 interventions that took place between 2009 and 2014, could it be positively established that a directive was issued. In 84%, it was clear that no directive was issued and in 8% the documentation was unclear on the issue.

Practice thus seems to suggests that provinces do not view the directive in terms of Section 139(1)(a) of the Constitution as a necessary precondition for an intervention in terms of other parts of Section 139(1) of the Constitution. In light of the fact that central government's guidelines stipulate otherwise and that the courts seem to disagree on the issue, this may not be an altogether watertight proposition.

It is submitted that not utilising the directive reduces the possibility of shortening interventions and achieving results through less intrusive means. As stated above, a directive, issued in terms of Section 139(1)(a) of the Constitution is an instruction to the municipality. It is not merely a final notice to the municipality or an opportunity for it to avoid intervention. It is also clearly different from a request by the provincial executive or an offer of assistance. Instead, it creates an immediate legal obligation on the municipality to take the steps mentioned in the directive. If need be, the failure to implement the directive can be enforced in court.

[38] [2014] ZAGPPHC 400 ('Mogalakwena').
39 Mogalakwena at para. 20.

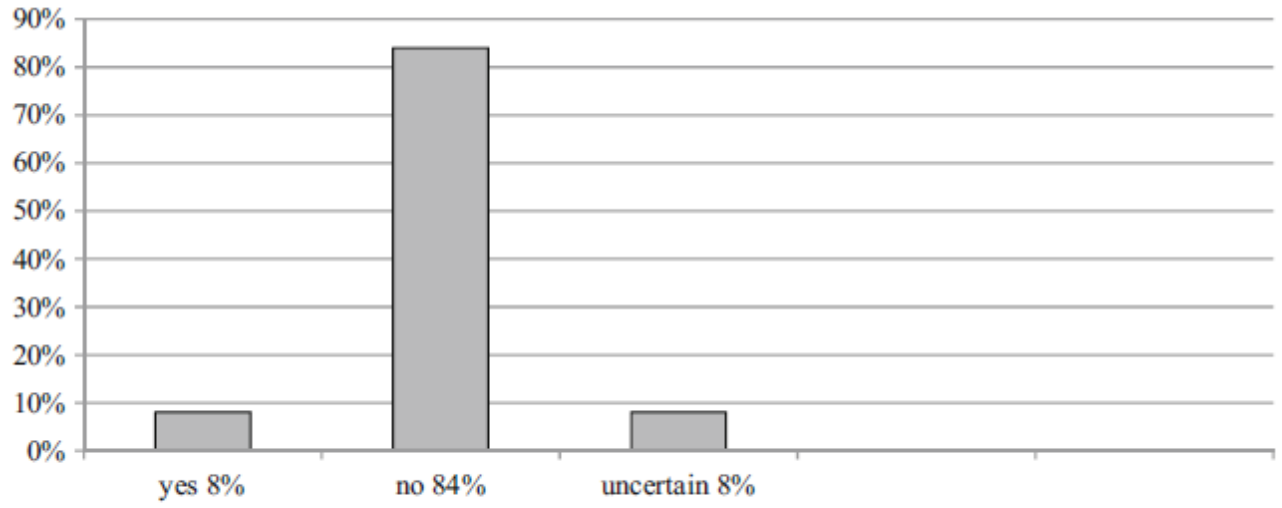

Fig. 2 Section 139(1)(a) directives issued prior to assumption of responsibility or dissolution

4.6 Assessing Substantive Requirements

4.6.1 The Failure to Fulfil an Executive Obligation

The next matter to be assessed relates to the most important substantive requirement in Section 139(1) of the Constitution, namely that a directive, assumption of responsibility or dissolution may only be instituted if a municipality 'cannot or does not fulfil an executive obligation in terms of the Constitution or legislation'. The onus is on the provincial executive to establish the failure to fulfil an executive obligation. The courts have made it clear that the provincial executive has limited discretion in this regard. In Mnquma, the Court held that the failure to fulfil an executive obligation is a 'statutory precondition or jurisdictional fact … not left to the discretion of the provincial executive but … an objective fact which is independently triable by a Court'.[40] In Mogalakwena,[41] the provincial executive had based its Section 139(1)(b) intervention on having 'reasons to believe' that certain obligations were not being fulfilled. The Court held that this was not sufficient to pass muster in terms of Section 139(1) of the Constitution. The provincial executive must gather sufficient information to satisfy that the precondition exists and ensure that the documentation, supporting the intervention clearly points out which executive obligation is not being fulfilled. In Mnquma, the Court condemned the provincial executive's approach whereby the facts were presented and accepted as true unless the municipality was able to provide sufficient and convincing evidence to conclude otherwise. The Court also problematised the use of the term 'political instability' to inform the failure to fulfil executive obligation [42]

There is another reason why the identification of the executive obligation is an essential element in the intervention process. The executive obligation determines the scope of a possible assumption of responsibility by the provincial executive. It is submitted that a

[40] Mnquma at paras. 49-50. Mogalakwena at para. 33.
[41] Mogalakwena at para. 33.
[42] Mnquma at para. 95.

provincial executive may assume responsibility only for the specific functional area that is linked to the obligation that was identified. Powers that fall outside the scope of the executive obligation that was identified remain the prerogative of the municipal council in the event of an assumption of responsibility. The identification of the executive obligation that is not being fulfilled is thus an essential element in the intervention process.[43]

The basic question that was examined in the context of the above was whether the provincial executive, in instituting the intervention and submitting the notice to the Minister and the NCOP, clearly set out which obligations were not being fulfilled. The question as to whether or not this assertion was supported with sufficient and convincing evidence requires a much more thorough analysis and fell beyond the scope of this study.

In 97% of the 39 interventions that were reviewed, the provincial executive clearly identified obligations that were not being fulfilled (Fig. 3). There was not one single intervention where the documentation did not single out specific obligations. In 3% of the cases, the documentation was not clear.

4.6.2 The Interpretation of 'Executive Obligation' in Section 139

A much thornier issue than the question as to whether or not the intervention relates to distinct failures to perform is the question as to whether those failures were failures to fulfil 'an executive obligation' as prescribed in Section 139(1) of the Constitution. If the failure relates to an obligation that is not executive in nature, then the provincial executive may not invoke Section 139(1) of the Constitution. The precise meaning of the term 'executive obligation' in Section 139 has been the subject of debate and the Mnquma judgment contains an interpretation by the Court. It is generally not difficult to distinguish the exercise of legislative powers by the council from the exercise of executive powers. The legislative functions of a municipal council are three, namely the approval of by-laws, the approval of a budget and the imposition of rates, taxes, levies, duties, service fees and surcharges on fees. It could thus be argued that anything other than these three functions is captured by the term 'executive obligation', given that the municipality does not have any judicial obligations. The Mnquma Court seemed to adopt such an approach when it characterised the executive functions as 'the residue of functions of government after legislative and judicial functions have been taken away'.[44] However, it is much harder to distinguish the exercise of executive obligations from statutory or administrative obligations. For example, when the municipality fails to adopt an annual report in terms of Section 121 of the MFMA, has it failed to fulfil an executive obligation? When the municipality fails to submit its annual financial statement to the Auditor-General in terms of Section 126(1)(a) of the MFMA, has it failed to fulfil an executive obligation?

[43] Department of Provincial and Local Government (2000), at p. 7; Department of Provincial and Local Government (2007), at p. 17.
[44] Mnquma at para. 58.

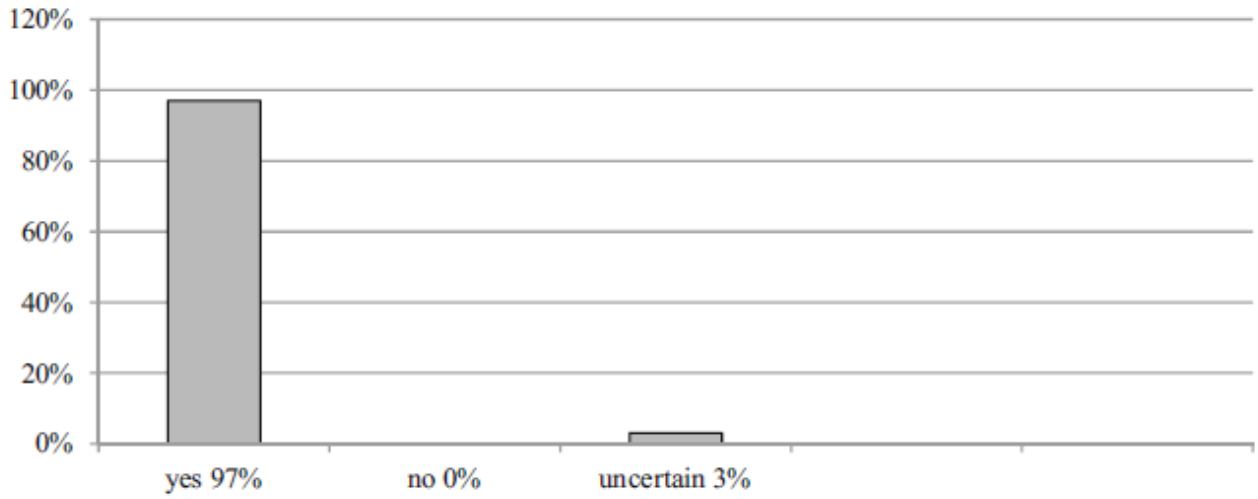

Fig. 3 Identification of failure to fulfill obligation in the notice to the Minister and NCOP

When the municipality fails to pay its employees' bond instalments in accordance with contractual requirements, has it failed to fulfil an executive obligation? In Mnquma, which contains the most detailed judicial treatment of the issue to date, the Court distinguished executive obligations from statutory obligations or duties that are aimed at ensuring the effective performance by local government of its executive obligations such as the reporting obligations referred to above.[45] It furthermore distinguished executive obligations from obligations arising from other sources such as contract, such as the obligation to pay an employee's bond instalments.[46]

According to Van Zyl J, in writing for the Mnquma Court, such an obligation would not, on its own, constitute an executive obligation that could trigger intervention as envisaged by Section 139(1) of the Constitution.[47] When the provincial executive relied on the municipality's failure to adhere to a range of statutory injunctions related to good governance and financial management, the Court held that they do not raise the issue of a failure to fulfil executive obligations but that they rather raise the question whether the … Municipality has complied with its executive obligation to establish and maintain an effective administration to perform its functions.[48]

The Court identified the following five elements of the concept 'executive obligation':

a) the implementation and administration of legislation;
b) the provision of services;
c) the provision of an administration;
d) the development of policy; and
e) the initiation of by-laws,

[45] Mnquma at para. 95.
[46] Mnquma at para. 66.
[47] Mnquma at para. 65.
[48] Mnquma at para. 99.

within the functional areas of local government, comprehended in Section 156(1)(a) of the Constitution.[49]

Taking the above definition of the term 'executive obligation', which is the most authoritative to date, an examination was done of each intervention during the period of review. The documentation in which the failure was substantiated was perused for compliance with the abovementioned definition: did the provincial executive relate the failure to perform to an 'executive obligation' as defined in Mgquma?

Figure 4 shows that in only 13 (33%) of the 39 interventions the relevant provincial executive was able to relate the failure to the 'executive obligation' as defined in Mnquma. In 25 out of the 39 interventions (64%) the failure did not relate to an 'executive obligation' as defined in Mnquma. With respect to one intervention (3%) the relevant documentation was not available.

A further analysis of the 64% of the interventions where the failure did not relate to any 'executive obligation' reveals that the provincial executive instead relied on provisions aimed at effective and transparent government and relate to matters such as:

- non-adherence to municipal procedures;
- lack of municipal planning and financial systems;
- the duties of specific officials in local government, such as the failure by the municipal manager to inform the auditor-general of unauthorised spending, to submit annual financial statements and account bank details to the provincial treasury; and
- the legality of the appointment of officials.

Following the approach set out in Mnquma, the failures relied on above relate to statutory obligations and not to executive obligations. They are failures to abide by provisions aimed at providing 'effective performance by municipalities of their functions as envisaged in Section 155(7) of the Constitution, as opposed to imposing executive obligations within the meaning of that term'.[50]

The discrepancy between the legal framework and the actual practice of intervention suggests that the concept of 'executive obligation', as defined in Mnquma causes considerable difficulty in the implementation of Section 139 of the Constitution. It seems that provincial executives are unsure as to how to adequately substantiate the intervention. The consequence is that interventions are legally vulnerable. In the context of the perilous state of significant parts of the local government system, referred to in the introduction to this article, it is unlikely that 64% of the interventions were indeed unwarranted. There is thus all the more reason for concern about the legal difficulty surrounding their motivation. The objective of the substantive requirements in Section 139

[49] Mnquma at para. 64.
[50] Mnquma at para. 91.

of the Constitution can never be to make it impossible for a provincial executive to intervene in seriously dysfunctional municipality or in a municipality that is rapidly sliding towards dysfunction.

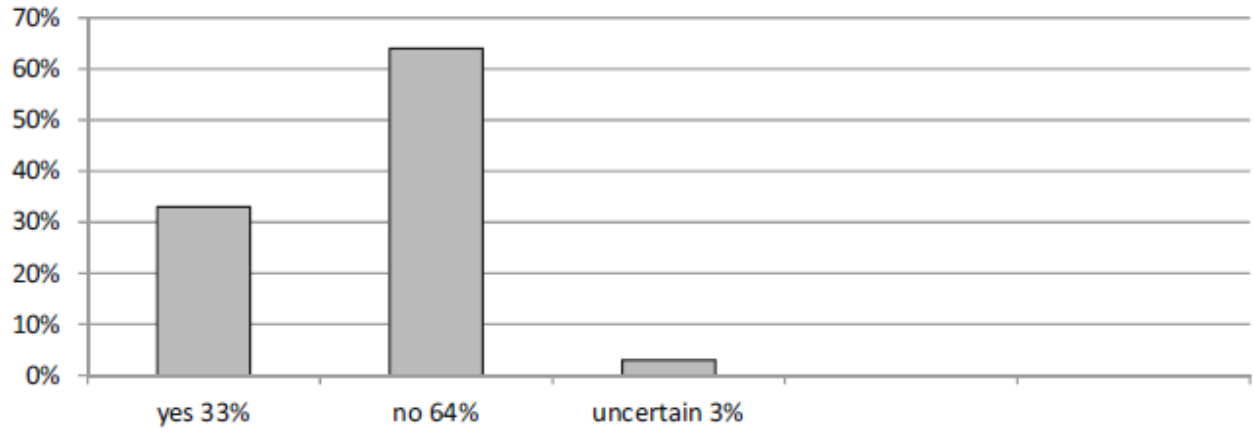

Fig. 4 Does the failure relate to an 'executive obligation' as defined in *Mnquma*?

It seems that the national government would be well advised to address the uncertainty surrounding the interpretation of the term 'executive obligation' in the forthcoming legislation on Section 139 of the Constitution.

4.7 Procedural Requirements After the Intervention

4.7.1 Informing the Minister

Moving from the substantive requirements to the procedural requirements for intervention, the inquiry proceeds to the role played by the national Minister responsible for local government. Within 14 days after the notice of assumption of responsibility has been issued to the municipality, the provincial executive must notify the Minister for local government of the intervention and request him or her to approve it.[51] An intervention in terms of Section 139(1)(b) of the Constitution ends automatically if the Minister does not approve the intervention within 28 days, or explicitly disapproves it within the 28 days period.[52] With regard to interventions in terms of Section 139(1)(c) of the Constitution (dissolution) it works differently. The notice in terms of Section 139(1)(c) must be submitted to the Minister and the NCOP 'immediately' and the intervention takes effect unless the Minister sets aside the intervention within 14 days after the NCOP has received the notice.[53] The sample of interventions that were subject of the review included 36 interventions in terms of Section 139(1)(b) of the Constitution. The research focused on the basic question whether the provincial executives in these 36 interventions adhered to the 14 day time limit for the notification of the Minister.

[51] Section 139(2)(a)(i) Constitution.
[52] Section 139(2)(b)(i) Constitution.
[53] Department of Provincial and Local Government (2000), at p. 22.

Figure 5 shows that in 21 (58%) of the cases, it could be established that a notice was submitted to the Minister in time. However, in nine interventions (25%), it could be established that the notice was submitted outside of the 14 working day time limit. In six out of the 36 interventions (17%), the information available was insufficient to establish whether or not the notice was submitted on time.

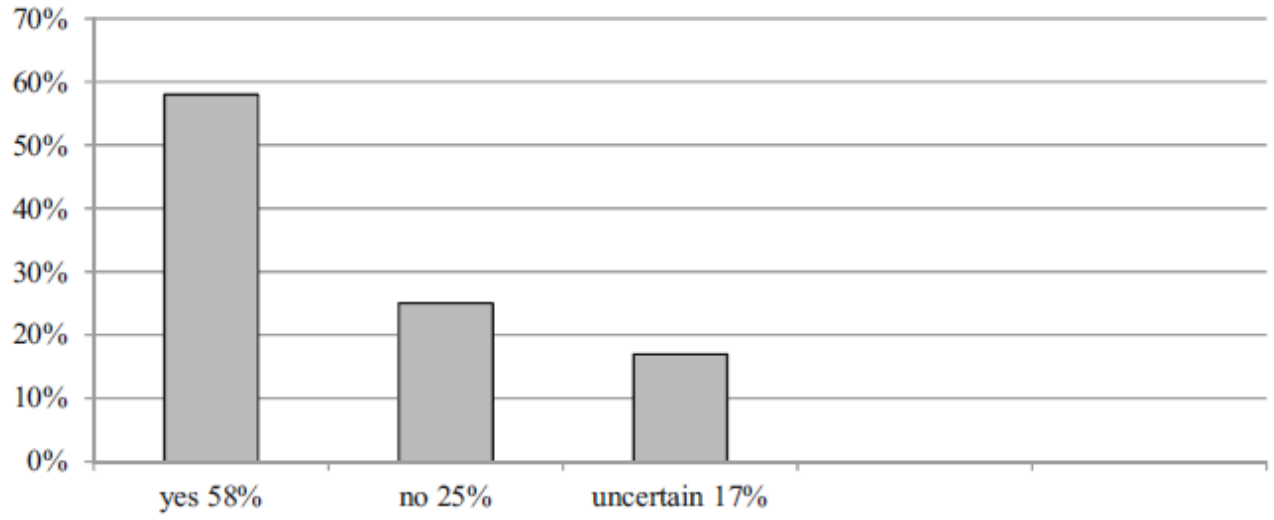

Fig. 5 Was the Minister informed within 14 days?

The provincial executives mostly complied with the timeframe for notifying the Minister but they did not to do so in a quarter of the cases that were reviewed. Given the specific wording of the Constitution and the import of the checks on provincial intervention, the consequences of a failure to submit the notice on time are not hard to fathom: the Minister is not competent to consider a late submission as the Constitution does not provide for a ministerial power to condone late submissions. The Minister's approval of an assumption of responsibility that was submitted late cannot be valid and the intervention must thus automatically end at the end of the 28 day period referred to above.

4.7.2 Informing the NCOP

The same 14 day timeline applies to the notification of the NCOP. After the notice of assumption of responsibility has been issued to the municipality, the provincial executive must, within 14 days, notify the NCOP of the intervention and request its approval.[54] The purpose of the notification is to trigger the NCOP's decision making on whether the intervention must be approved. The intervention will end automatically if the NCOP does not approve the intervention within 180 days, or explicitly disapproves it within the 180 days period.[55] The NCOP must also 'review the intervention regularly' and may make recommendations to the provincial executive.[56]

[54] Section 139(2)(a)(ii) Constitution.
[55] Section 139(2)(b)(ii) Constitution.
[56] Section 139(2)(c) Constitution. See also Department of Provincial and Local Government (2007), at pp. 23–27.

Again, the basic question with respect to the 36 interventions under review is whether the provincial executive submitted the notice to the NCOP within the timeframe prescribed by the Constitution.

Figure 6 shows that in 22 (61%) of the cases, the timeframe was adhered to. In 11 (31%) of the cases, it was not. In 3 (8%) out of the 36 interventions, it could not be established whether or not the notice was submitted to the NCOP in time. It goes without saying that the attention goes to 31% of cases where it could be positively established that notices were not submitted within the required time-frame. In reality, this percentage could be even higher if it is assumed that there may be further instances of late submission in the 8% where the documentation was incomplete. In none of these interventions did the late submission cause the NCOP to refuse to approve the intervention and the interventions went ahead. The NCOP seems to have condoned all the late submissions despite the fact that the Constitution does not include a provision that empowers the NCOP to condone late submission. It can be argued that the NCOP was not competent to approve these interventions and that they went ahead unconstitutionally.

4.7.3 Timelines for the Minister's Decision

In the case of an assumption of responsibility, the Minister has 28 days, calculated from the day the intervention began, to approve the intervention.[57] If the Minister does not take any decision within the 28 days, the intervention lapses automatically.

In the case of a dissolution, the Minister has 14 days, calculated from the day the NCOP received the notice, to approve the intervention.[58] If the Minister does not take any decision within those 14 days, the dissolution takes effect.[59] The question that was examined is whether, with respect to the 36 interventions in terms of Section 139(1)(b) of the Constitution, the Minister took a decision within the timelines prescribed by the Constitution.

Figure 7 shows that in 10 (28%) of the cases, the Minister's decision was taken within time limits prescribed for interventions invoked in terms of Section 139(1)(b) of the Constitution. In 11 (30%) out of the 36 interventions the decision was taken too late. In 15 (42%) of the cases, it could not be established, on the basis of the available documentation, whether the decision was taken on time. As far as the two dissolutions in terms of Section 139(1)(c) are concerned one intervention was approved by the Minister on the same day as the notice for the intervention was submitted whilst the date for the other dissolution could not be ascertained as it was immediately challenged in court.

In almost a third of the cases, the constitutional deadline for the Minister's decision thus came and went without a decision having been made. In reality, the percentage could again be higher if the large number of 'uncertain' interventions contains further instances

[57] Section 139(2)(b)(i) Constitution.
[58] Section 139(3)(b) Constitution.
[59] Department of Provincial and Local Government (2007), p. at 22.

of the deadline not having been met. In the case of assumptions of responsibility, this would have meant that, on day 29, the intervention 'must end' as prescribed by Section 139(2)(b) of the Constitution. However, almost all the interventions continued. In the case of dissolution there would be no problem as the Constitution makes it clear that it takes effect if the 14 day period expires without the Minister setting aside the dissolution.

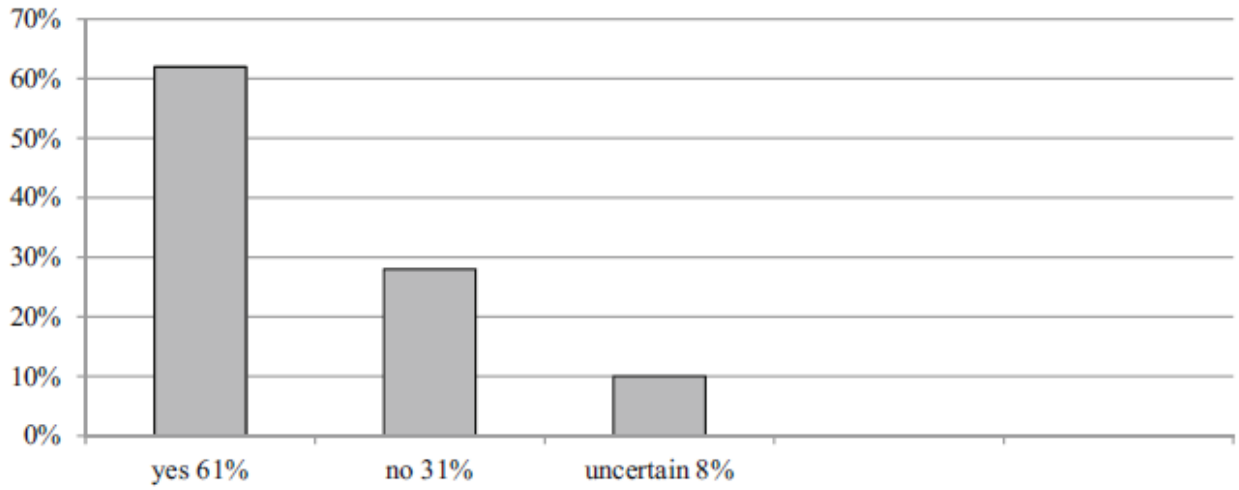

Fig. 6 Were notices submitted to the NCOP within the stipulated time-frames?

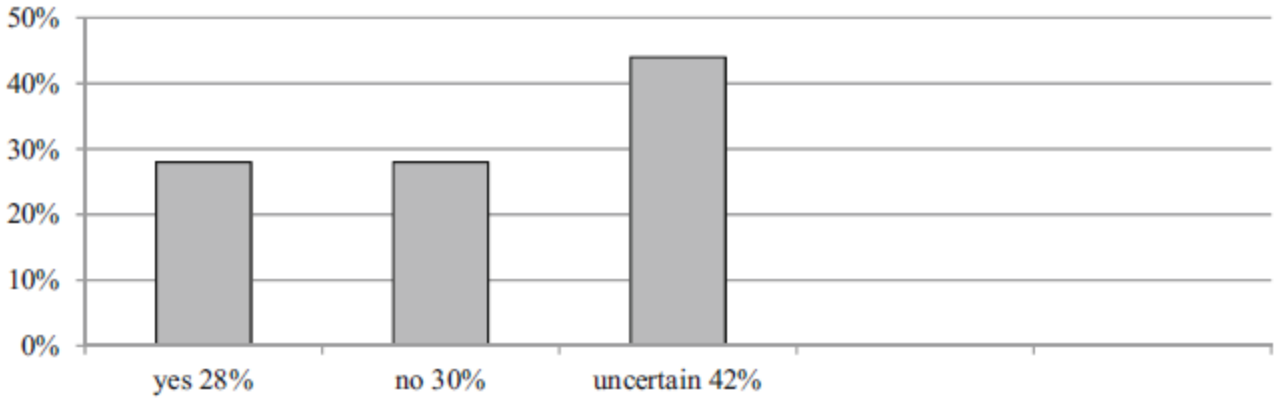

Fig. 7 Did the Minister approve or disapprove the intervention within the constitutional time limit?

However, in the case of assumptions of responsibility, some interventions continued despite the clear instruction in Section 139(2)(b) of the Constitution that it ought to have ended.

4.7.4 Timelines for the NCOP's Decision

As stated earlier, the NCOP has 180 days within which it must approve or disapprove an assumption of responsibility. If the 180 day period lapses without a decision, the intervention once again 'must end'.[60] With respect to dissolution, the NCOP has 14 days

[60] Section 139(2)(b)(ii) Constitution; Department of Provincial and Local Government (2007), at p. 23.

within which to make a decision with the expiry of those 14 days without a decision having the effect that the dissolution 'takes effect'.[61]

The research shows that, in the majority of interventions in terms of Section 139(1)(b) of the Constitution, namely 27 (75%) out of 36, the NCOP took a decision within the 180 day period (see Fig. 8). In one case (3%), the decision was made too late and in 8 (22%) cases, it could not be established whether or not the decision was made in time. As explained earlier with regard to the two dissolutions the date for the approval or disapproval for the dissolution could not be determined whereas the approval for the other dissolution transpired a few days after the notice for the intervention was submitted.

It is clear from the data that the NCOP was more compliant with the constitutional time limits than the Minister. The time period for the NCOP to take a decision (180 days) is also significantly longer than the Minister's (28 days) in the case of the assumption of responsibility. In only one out of the 36 cases, could it be positively established that the NCOP took longer than the 180 days to take a decision. In terms of Section 139(2)(b) of the Constitution, this intervention ought to have ended at the end of the 180 day period. However, the documentation indicates that this intervention proceeded, arguably against the provisions of the
Constitution.

5 Conclusion and Recommendations

This article started out by asserting that decentralisation, with all its facets pertaining to local autonomy but also the permitted incursions into autonomy, is rules-based. The integrity and success of the system depend on whether or not both subnational governments and national governments substantially adhere to those rules. When a province intervenes into a municipality by 'taking over' the administration of that municipality this is a serious incursion into the autonomy of that municipality and adherence to the rules surrounding an intervention is crucial. From the above review of provincial practice surrounding interventions into ailing municipalities, a number of trends emerge.

First, the data suggests that the assumption of responsibility is by far the most used intervention. New constitutional provisions on budgetary and financial management interventions as well as the dissolution of the council that were introduced in 2003 have hardly been used. Provinces prefer to deploy the 'classic' assumption of responsibility in terms of Section 139(1)(b) of the Constitution to seek to arrest problems in municipalities. This is remarkable, given that this instrument comes with stronger procedural and substantive safeguards for municipalities than its counterparts in Sections 139(4) and (5) of the Constitution. Provinces thus choose the mode of intervention that is most cumbersome to them.

[61] Section 139(3)(b) Constitution.

In implementing Section 139(1) of the Constitution, provinces do not seem to place a high premium on ensuring that the affected municipality is issued with a prior notice of an impending intervention. The Constitution does not stipulate that the prior notice must be submitted to the Minister and the NCOP together with the notice of the intervention. However, the guidelines on the application of Section 139 of the Constitution do advise that prior notice be given. It is submitted that the absence of a prior notice from the process or from the documentation to be verified by the Minister and the NCOP signals that municipalities are not always being properly informed or consulted on an impending intervention.

Practice suggests that the interpretation of the term 'executive obligation' in Section 139(1) of the Constitution presents real difficulty. The definition in the Mnquma judgment may appear sensible. However, practice suggests that provinces are not following the interpretation put forward by the Court. This may be because it deprives provinces from using interventions in response to statutory failures that, while not equal to a total collapse, signify a steep decline towards malfunction.

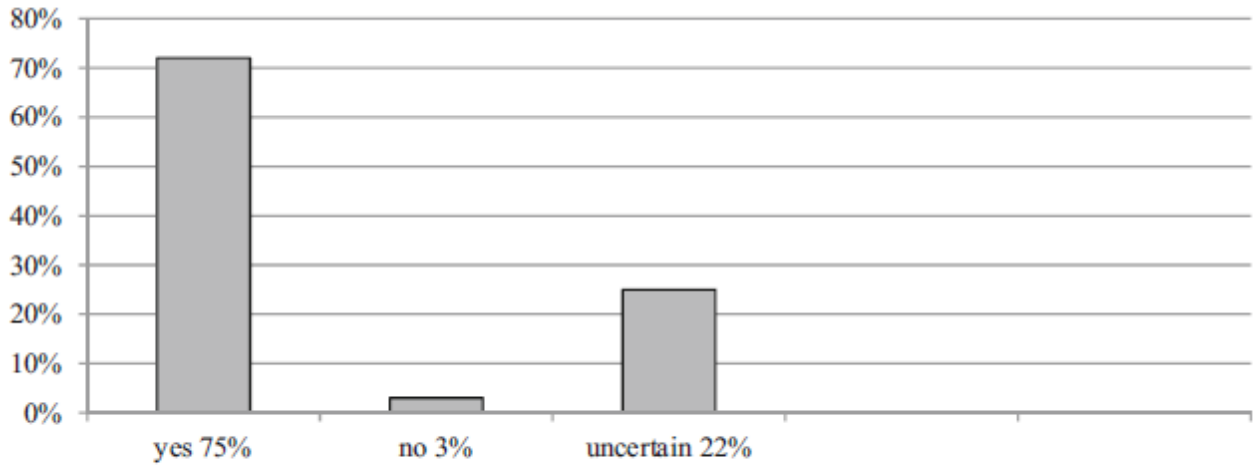

Fig. 8 Did the NCOP approve or disapprove the intervention within the specified time-frame?

At the very least, the disjuncture between the definition in Mnquma and provincial practice points towards the need to clarify the meaning of the term 'executive obligation' in legislation.

The research indicates that provinces do not consider the issuing of a directive to be a precondition for the institution of other, more intrusive interventions. The official guidelines suggest, however, that the directive must, in principle, be pursued first. Furthermore, the courts have disagreed as to whether the directive is a precondition. It is suggested, therefore, that the need for a prior directive must be considered on a case-by-case basis. The fact that 84% of the interventions omitted the directive indicates that this is not current practice.

In a significant number of cases, the provincial executive did not inform the Minister and the NCOP within the time period prescribed by the Constitution. Considering that the Constitution does not permit the Minister or the NCOP to condone a late submission, this should have prompted the Minister and the NCOP to disapprove of these interventions. Given that the intervention is an effort to correct a municipality's legal transgressions, it is counterintuitive to allow the intervening province to flout the law while conducting the intervention and to allow these transgressions to go without consequence. While there may be explanations as to why decision making may be delayed (see below), there is little that can explain a provincial executive's inability to cause a notice to be sent out in time.

It is clear that the 28 days within which the Minister must approve or disapprove an assumption of responsibility is a challenge, considering the fact that close to a third of the Minister's decisions did not come in time. The Minister's time to decide may also in fact be shorter than the 28 days, given that the relevant provincial executive may take up to 14 days to notify the Minister. Nevertheless, these interventions should have ended as the Constitution leaves no doubt that the deadline is fatal. The fact that they continued signals a lack of appreciation for the procedural rigour with which the Constitution surrounds interventions. Again, it is problematic when the effort to arrest a municipality's violation of the law becomes tainted with illegalities on the part of those organs of state that stage and approve that very same intervention.

It is useful to reiterate the point that the integrity and success of the system of decentralisation depends on adherence to the rule of law on the part of both national and subnational governments. If senior governments illegally encroach on the autonomy of subnational governments, this undermines the objectives of decentralisation, which is to deepen local democracy, facilitate development and foster adherence to the rule of law. The review of the practice of provincial interventions into municipalities suggests that, by and large, provincial executive adhere to the strictures of the Constitution. However, it also suggests that there are areas where constitutional provisions are not adhered to.

Furthermore, the review of the practice of provincial interventions into municipalities suggests that there is a need for government to introduce the legislation envisaged by Section 139(8) of the Constitution. It is submitted that this legislation should regulate the process of Section 139 interventions and in so doing provide clarity where the Constitution does not. It should clarify the trigger for the intervention and respond to the Mnquma judgment. The approach followed by the Mnquma Court now implies that provinces may not intervene by citing failures that are clear indications of distress, such as failures to provide financial statements, reports, pay creditors etc. It almost seems that a total collapse is required before the power to intervene may be used. This runs counter to the overall intention of the instrument of intervention which is to respond to municipal failures before it is too late. The legislation in terms of Section 139(8) should clarify key executive obligations that, if not fulfilled, may trigger intervention. This will insert greater predictability and is likely to make interventions more effective. The legislation should also deal with the use of prior notices, the place of the 139(1)(a)-directive and the

information that must be submitted to the Minister and the NCOP. This will again insert greater predictability and transparency into the system and enhance the overall credibility of the regime and practice of interventions.

Many municipalities are grappling with serious challenges in governance and financial management and interventions will most likely remain a necessary instrument in the hands of provincial executives as the new local government system continues to settle in. The Constitution suggests that Parliament adopts legislation to assist provinces in implementing the constitutional provisions on interventions. This experience detailed in this article suggests that the system of decentralisation in South Africa will be well served with such legislation.

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