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# Powers of Local Government

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The Local Government Working Paper Series disseminates policy and legal analyses to improve local governance in South Africa. The papers are short, preliminary studies intending to provide a brief look at relevant and timely topics. For additional information, please contact Dr Jaap de Visser at jdevisser@uwc.ac.za or visit the Local Government Project website at http://www.communitylawcentre.org.za/Projects/Local-Government
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## Local Government's Institutional Status

The Constitution recognises and makes provision for three levels of government that derive their powers from the Constitution. The constitutional status of a municipality, as part of the third sphere of government, is thus materially different from what it was when Parliament was supreme. Under the parliamentary sovereignty, the institution of elected local government could have been terminated at any time by the central or provincial governments.

The judgement, delivered by the Constitutional Court in *Fedsure Life Assurance and Others v Greater Johannesburg Transitional Metropolitan Council and Others*[1] forms the bedrock of any analysis of local government's powers. It was in this case that the Constitutional Court made an unequivocal statement as to the status of local government in the post-1994 constitutional framework. The Court made it clear that "local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself."[2]

The Court had to consider whether or not council resolutions levying rates and levies constituted "administrative action" and were therefore subject to principles of administrative justice. In the arguments before the Constitutional Court, the relevant municipal councils contended that the resolutions constituted legislative rather than administrative action, and accordingly were not subject to administrative justice. The Court agreed and said that the enactment of legislation by an elected local council acting in accordance with the Constitution is a legislative and not an administrative act. It is not subject to challenge by "every person" affected by it on the grounds, pertaining to administrative justice.

This judgement put two cardinal principles of the new local government dispensation beyond doubt: Firstly, the institution of local government as a sphere of government and the powers of municipalities are recognised and protected in the Constitution. Secondly, the exercise of municipal legislative power is no longer a delegated function, subject to judicial and administrative review, but a political process, influenced by the considerations and input of elected councillors, representing the will of the municipal residents.

What, then, are those local government powers that the new dispensation so carefully protects?

## Sources of Power For Local Government

Section 156(1)(a) of the Constitution provides that a municipality has executive authority in respect of, and has the right to administer the local government *matters listed in Part B of Schedule 4 and Part B of Schedule 5 to the Constitution* and any

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[1] 1998(12) BCLR 1458 (CC).
[2] At para 26; see also Klaaren 1999: 11; Steytler and De Visser 1999: 6-7.

other matter assigned to it by national or provincial legislation. The Constitution recognises the municipal council as the highest legislative and executive authority within a municipality that can make decisions on the exercise of these powers within the municipality.[3]

**Original powers**

Schedules 4B and 5B constitute the *primary source* of power for local government. Local government derives these powers from the Constitution itself; it has original powers, listed in Schedule 4B and Schedule 5B of the Constitution.[4] The obvious significance of this lies in the fact that the 'core' functions of local government cannot be removed or amended by ordinary statutes or provincial acts. These functions cannot be changed but for an amendment to the Constitution itself. Moreover, the powers of national and provincial governments to legislate on Schedule 4B and 5B matters are limited.[5] These two components are probably the most critical and fundamental features of local government's institutional integrity.

**Assigned powers**

The secondary source of power for local government is assignment in terms of section 156(1)(b), which provides that a municipality has executive authority in respect of, and has the right to administer *any other matter assigned to it by national or provincial legislation*. Assignment can take the form of general assignments or assignments to individual municipalities.[6]

This article deals with two issues:

Firstly, it attempts to demarcate the boundaries of local government's original legislative powers on Schedule 4B and 5B matters by analysing the *powers of other spheres to legislate on Schedule 4B and 5B matters*. Secondly, it discusses the legal framework for the *assignment of additional* powers to local government.

## Legislative powers of other spheres on local government's 'original powers'

### *A test to determine which law prevails*

As stated above, local government can legislate on Schedule 4B and Schedule 5B matters. However, the Constitution does not allocate the matters in Schedule 4B and

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[3] Section 151(1) of the Constitution: "A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution"; section 160(1) of the Constitution: "A Municipal Council...makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality".

[4] Section 156(1) of the Constitution: "A municipality has executive authority in respect of, and has the right to administer ...the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5." See *Debates of the Constitutional Assembly* 29 March to 8 May 1996 p 256 (ANC MP Mr M Bhabha), 259 (ANC MP Ms M Verwoerd), 273 (FF MP Mr P J Groenewald) and 279 (DP MP Mr K M Andrew).

[5] *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR 883 (CC) para 25.

[6] Sections 44(1)(a)(iii), 104(1)(c), 99 or 126 of the Constitution provide for individual assignments; this article does address the issues of delegation in terms of section 238 of the Constitution or agency agreements, which are often used to transfer functions to local government.

5B *exclusively* to local government. National and provincial government can also regulate on those matters.[7] In fact, they have the authority to ensure that municipalities perform these matters adequately.[8] This means that interference by national and provincial government in Schedule 4B and 5B matters is not only constitutionally permitted but also mandated in terms of their oversight role. What happens if a municipality legislates on a Schedule 4B or 5B matter whilst there is national or provincial legislation on the same matter? How are conflicts resolved? Section 156(3) determines that a by-law that conflicts with national or provincial legislation is invalid but what is the *extent* to which other spheres of government can legislate on these matters? This part of the article explores the legislative powers of local government by proposing a test for determining which law prevails if there is municipal as well as other legislation on one topic. Does the municipal by law prevail or does the national or provincial act prevail?

It is submitted that this test comprises of four questions.

1. *Is there national or provincial legislation on the subject matter of the by-law?*
2. *If yes, does the by-law conflict with that legislation?*
3. *If there is conflict, is the national or provincial law* ***valid?***
4. *Does the national or provincial legislation* ***impede or compromise*** *the municipality's ability to perform its task?*

## 1 Is there national or provincial legislation on the subject matter of the by-law?

If there is no national or provincial legislation on the matter, the municipality has a free hand in deciding on the content of the by-law. If there is national or provincial legislation, the enquiry proceeds to the second question.

The question arises as to what happens when provincial or national legislation is enacted *subsequent* to the passing of the by-law. It is suggested that the inquiry then proceeds to the second question.

## 2 If yes, does the by-law conflict with that legislation?

If a by-law does not conflict with national or provincial legislation, the override does not need to enter the equation and the by-law is valid. The question as to whether or not a by-law is in conflict with other legislation is not always easy to answer. For example, if a national law prevents the use of irregular scales and a municipal by-law on markets regulates the manner in which goods are weighed - namely open and for the customer to see - is there conflict? The national law regulates on a different *topic,* namely uniformity and trustworthyness of scales while the by-law regulates the fair conduct of merchants on a municipal market.

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[7] *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development* at para. 23.

[8] White Paper on local government p 30.

It is suggested that the question as to whether or not there is conflict should be answered from a point of view of implementation and enforcement. There is no conflict if it is possible to implement and enforce both regulations with regard to the same matrix of events without difficulty. If the enforcement of both regulations is problematic, an there is an inconsistency.

**3 If there is conflict, is the national or provincial law valid?**

The Constitution does not give blanket regulatory power on Schedule 4B and 5B matters to national and provincial government. National or provincial legislation on local government matters must be enacted *within national or provincial government's legislative competency*. Chapter 7 of the Constitution determines the legislative competency of national and provincial governments on local government matters. There is a difference with the concurrency of powers between provincial and national powers of Schedule 4A matters. Were local government powers to be held *concurrently* with national or provincial government, this test would not apply. In a scheme of *concurrent* powers, both spheres have *the same* legislative competency and the overrides determine which law prevails in case of conflict. This is not the case with local government powers. National and provincial governments are afforded *certain* legislative powers in relation to local government matters: their powers are constrained.[9] Therefore, the question of overrides is preceded by the question of competence to legislate. This is the most complex part of the test. The article will examine:

- national powers over Schedule 4B;
- provincial powers over Schedule 4B;
- national powers over Schedule 5B; and
- provincial powers over Schedule 5B.

**National government's powers on Schedule 4B matters**

Currently, national government's lawmaking powers on Schedule 4B matter are the subject of an important case, to be heard by the Pretoria High Court. The City of Cape is challenging national legislation that makes municipal electricity distribution subject to a licence issued by the National Electricity Regulator (NER) and makes municipal electricity tariffs subject to NER approval. Essentially it is claiming that it has the constitutional power to set its own electricity tariffs and to supply and distribute electricity in its area without needing a licence. Its Schedule 4B function of "electricity reticulation" entitles it to make and carry out decisions regarding electricity reticulation in its area and to exercise any power reasonably necessary for, or incidental to, the effective performance of its functions. This would include the right to set its own tariffs.

National government has two sources of legislative competence in respect of Schedule 4B matters: section 155(7) and section 44(1)(a)(ii) of the Constitution.

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[9] *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR 883 (CC) para 25.

### *National laws in terms of section 155(7)*

National government can legislate on Schedule 4B matters on the basis of section 155(7), which affords national government the power to 'regulate' the exercise by municipalities of their executive authority. This legislative power is limited, since it is circumscribed by the context of seeing to the "effective performance by municipalities of their functions in terms of Schedule 4" and the term "regulating". The term 'regulating' in the context of section 155(7) was held by the Constitutional Court to connote "a broad managing or controlling rather than direct authorisation function".[10] Textually, the word 'regulate' is used in the context of the exercise of a legislative and executive power of both national and provincial governments in respect of municipal executive authority. It is submitted that the powers in terms of section 155(7) do not extend to the 'core' of Schedule 4B matter, but rather deal with the framework within which local government is to exercise these powers.[11] In other words, the regulatory power enables national government (and also provincial government, see below) to set essential national standards, minimum requirements, monitoring procedures etc.

### *National laws in terms of section 44(1)*

National government can also legislate on Schedule 4B matters on the basis of section 44(1)(a)(ii) of the Constitution.[12] There is no limitation contained in this provision. Does this amount to a broad legislative power, encompassing every aspect of the Schedule's matters? The introduction to Schedule 4B stipulates that the schedule contains local government matters that are of national and provincial competency *"to the extent set out in section 155(6)(a) and (7)"*. The question, therefore, is whether this qualification also applies to Parliament's legislative power in terms of section 44(1). Does section 155(7) qualify section 44(1)? In other words, can Parliament use its legislative power on 4B matters in terms of section 44(1) only to "see to the effective performance by municipalities" of those functions by "regulating the exercise ...of their executive authority or is section 44(1) limited only by the general principles of 151(4) and 41(g)?[13]

A positive answer would prohibit Parliament from legislating on the 'core' of 4B matters, such as air pollution, municipal health services, municipal planning and water services. Parliament would have to limit its legislative efforts on those and

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[10] *In Re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) at para. 377.

[11] Mettler 1998: 9.

[12] " 44. (1)The national legislative authority as vested in Parliament -
(a) confers on the National Assembly the power
- (i) .....
(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; ..."

[13] Section 41(1) (g): "All spheres of government and all organs of state within each sphere must (...) 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;"

other 4B matters to framework legislation, national standards, minimum requirements, monitoring procedures etc.

Mettler argues that section 155(7) does not qualify section 44(1).[14] A first reading of the relevant provisions appears to affirm his view. Yes, Schedule 4B circumscribes the competence of national government to section 155(7) but section 155(7) again makes its application "subject to section 44". More importantly, section 44 forms the bedrock of national lawmaking and the power of Parliament to legislate on 4B directly follows its power to amend the Constitution itself. To argue that section 155(7) qualifies section 44(1) would then not be in keeping with the key position of section 44 in the Constitution. This would mean that Parliament can validly enact any kind of legislation on Schedule 4B matters and that the test envisaged in section 151(4) is the only test to be applied.[15] If this submission were to be upheld, it would effectively remove the third question from the test outlined above in the case of national government's powers on Schedule 4B matters.

This issue was dealt with, at least partly, by the Constitutional Court in *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development et* al.[16] The national government's submission was that Parliament has concurrent powers with the other spheres of government in respect of all powers vested in such spheres by Chapter 7, except for matters falling within Schedule 5B. This submission was based on section 44(1)(a)(ii) of the Constitution. In that same case, the Western Cape and KwaZulu-Natal provinces contended that the Constitution places certain constraints on Parliament's powers in respect of local government. The Constitutional Court agreed with the provinces.

> "The legislative power vested in Parliament by section 44(1)(a)(ii) "to pass legislation with regard to any matter... excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5" must be exercised, in terms of subsection (4), "in accordance with, and within the limits of, the Constitution". Thus, where on a proper construction of the Constitution such limits exist, they constrain the residual power of Parliament... The submission that Parliament has concurrent powers with the other spheres of government in respect of all powers vested in such spheres by Chapter 7 is inconsistent with the language of the provisions of Chapter 7 itself and cannot be reconciled with the terms of section 164. If Parliament indeed had full residual power in respect of all matters referred to in Chapter 7, there would have been no need for the reference in section 164 to "any matter not dealt with in the Constitution".[17]

[14] Mettler 1998: 7.
[15] See below.
[16] 1999 (12) BCLR 1360 (CC).
[17] At para 25 and 28.

In this case, the Court was dealing with issues related to legislation on the framework for local government, such as the establishment of municipalities and their internal arrangements. Therefore, it is not immediately clear from this, whether or not section 155(7) qualifies section 44(1)(a)(ii). However, the Constitutional Court appears to confirm this view, albeit in passing, in *Premier of the Province of the Western Cape v President of the RSA and others*. The Court remarked that

> "Local governments have legislative and executive authority in respect of certain matters but national and provincial legislatures both have competences (...) for *overseeing* its functioning"[18]

Two details are important: firstly, the Court defines the national competence as *overseeing,* and secondly, the footnote refers to section 155(7) of the Constitution. This implies that the Court views national government's role on Schedule 4B matters as a regulatory, rather than determinative role and that the source for this limitation is section 155(7).

This issue appears to have been settled in the *Langeberg* case where the Constitutional Court summarised national legislative authority as follows:

> "...national legislative authority includes the power to make laws for the country concerning all matters *except the functional areas described in Part 2 of Schedule 4 and Part 2 of Schedule 5*. In these areas, Parliament as *limited* legislative authority.[19]

In addition to the above it is suggested that the principle of developmental local government should inform an interpretation that recognises the need for sufficient municipal discretion in regulating these matters whilst maintaining the need for national oversight and regulation. Therefore, the answer to the question whether or not section 155(7) qualifies section 44(1)(a)(ii) must be that it does. This means that national government's legislative power on Schedule 4B matters does not extend to the 'core' of Schedule 4B matters but is limited to the setting of a legal framework, including minimum standards and monitoring requirements.

**Provincial government's powers on Schedule 4B matters**

The sources of provincial power to legislate in Schedule 4B matters can be found in section 155(6)(a) and section 155(7).

**Provincial laws in terms of section 155(7)**

Provincial government has a regulatory power in terms of section 155(7). The same considerations that apply to national government's powers under section 155(7) apply here.

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[18] *Premier of the Province of the Western Cape v President of the RSA and others* 1999(4) BCLR 382 (CC) at para 51 (emphasis added).
[19] *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR 883 (CC) para 25 (emphasis added).

**Provincial laws in terms of section 155(6)(a)**

Section 155(6)(a) echoes the duty to support and strengthen LG imposed on national and provincial government in section 154(1) for provincial government in particular. It instructs provinces to monitor and support LG and promote the development of LG capacity. The duty on the province to monitor and support in terms of section 155(6)(a) can entail legislative measures which are aimed at either establishing a monitoring framework or impacting on the manner in which local government administers such matters. The Constitutional Court held that the "legislative and executive powers to support local government (LG) are...not insubstantial. Such powers can be employed by provincial governments to strengthen existing LG structures, powers and functions and to prevent a decline or degeneration of such structures, powers and functions."[20] The Court further held that this power is to be read in conjunction with the legislative and executive role granted provincial government in sections 155(6)(b) and 155(7). In terms thereof, the provinces must assert legislative and executive power to promote the development of LG capacity to perform its functions and manage its affairs and may assert such powers, by regulating municipal executive authority, to see to the effective performance by municipalities of their functions in respect of listed LG matters. Taken together these competences are considerable and facilitate a measure of provincial government control over the manner in which municipalities administer Schedule 4B matters. This control is not purely administrative. It could encompass control over municipal legislation to the extent that such legislation impacts on the manner of administration of LG matters.

The word "monitor" in section 155(6) was not interpreted by the Court as bestowing additional or residual powers of provincial intrusion on the domain of local government, beyond perhaps the power to measure or test at intervals its compliance with national and provincial legislative directives or with the Constitution itself.[21]

**Assessment**

This short discussion of the legislative powers of national and provincial powers with regard to Schedule 4B matters presents the following picture:

- Local government has legislative authority over Schedule 4B matters.
- Provincial government has regulatory powers over Schedule 4B matters - these cannot be prescriptive with regard to the 'core' of Schedule 4B matters but are limited to the setting of a legal framework, which includes minimum standards and monitoring.
- National government has regulatory powers over Schedule 4B matters - these cannot be

prescriptive with regard to the 'core' of Schedule 4B matters but are limited to the setting of a legal framework, which includes minimum standards and monitoring.

[20] *In Re: Certification of the Constitutional of the Republic of South Africa* 1996 (1) BCLR 1253 (CC) at para 371.
[21] See also Pimstone 1998: 7.

**National government's powers on Schedule 5B matters**

All Schedule 5 matters are matters of 'exclusive provincial legislative competence'. The exclusivity is however subject to section 44(2), which enables national government to legislate on Schedule 5 matters "when it is necessary -

(a) to maintain national security;
(b) to maintain economic unity;
(c) to maintain essential national standards;
(d) to establish minimum standards required for the rendering of services; or
(e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole."

The test centres around the 'necessity' requirement and intervention is limited to the listed grounds. If the section 44(2) test has been passed, the national legislation is valid and operative.

It is submitted that the same qualification applies, namely that the legislative power does not extend to the 'core' of Schedule 4B matters but is limited to the setting of a legal framework, including minimum standards and monitoring requirements.

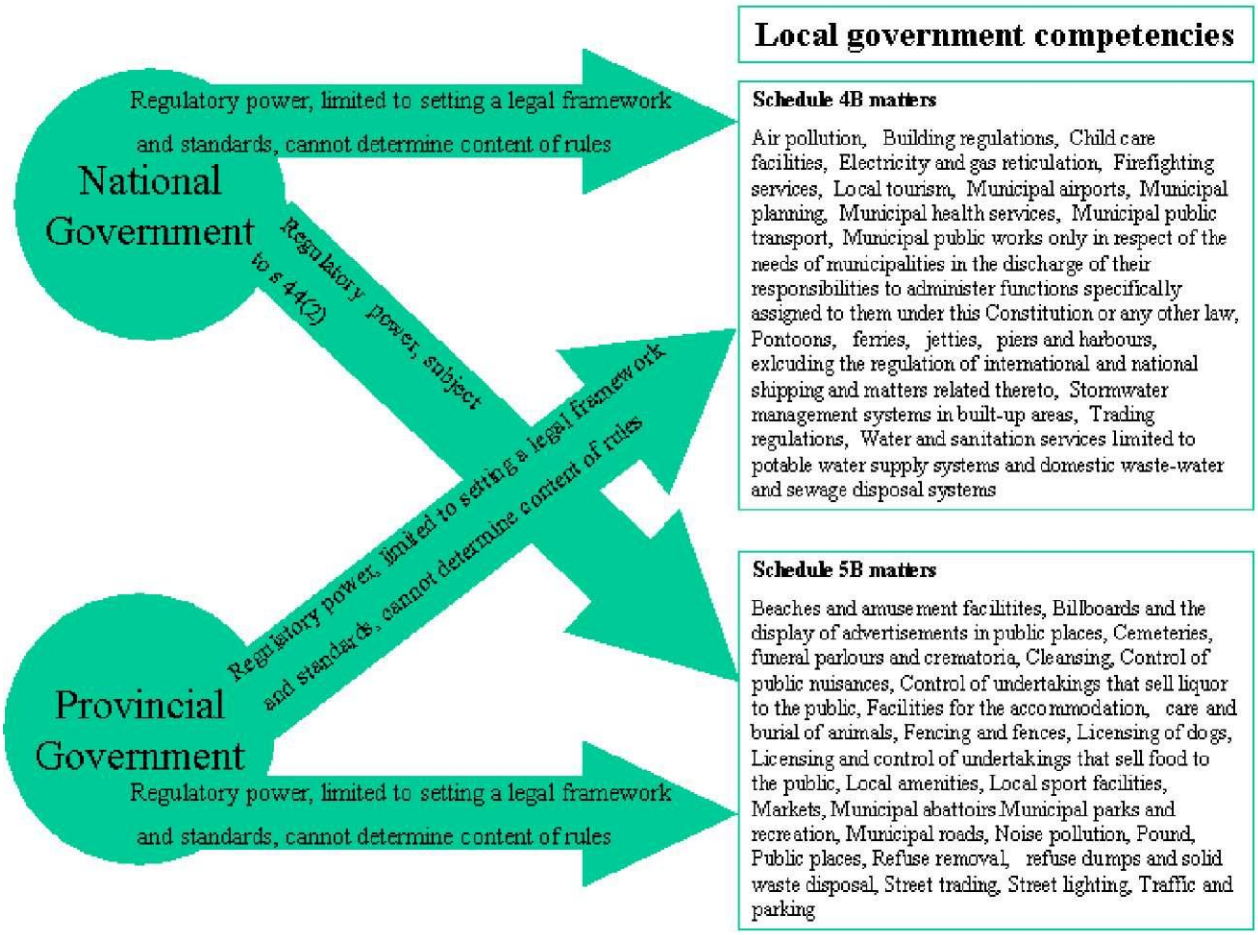
**Provincial government's powers on Schedule 5B matters**

The provincial government's legislative competence in respect of Schedule 5B is similar to its powers in respect of Schedule 4B matters. Consequently, provincial government has the same regulatory powers with regard to both 4B and 5B matters. On the face of it, it appears that these regulatory powers of provincial government with regard to 5B matters are wider than national government's regulatory powers, since provincial government is not restricted to the grounds listed in section 44(2) nor is it subject to the necessity requirement.

**Assessment**

- Local government has legislative and executive authority over Schedule 5B matters.
- Provincial government has regulatory powers over Schedule 5B matters - these cannot be prescriptive with regard to the 'core' of Schedule 5B matters but are limited to the setting of a legal framework, which includes minimum standards and monitoring
- National government has regulatory powers over Schedule 5B matters, restricted to the grounds of section 44(2) and the 'necessity requirement' in that provision.

The diagram below illustrates the legislative powers of national and provincial governments on local government matters.




The above outline can assist in determining whether a provincial or national law on a Schedule 4B or Schedule 5B matter is valid. If, on the basis of these questions, the national or provincial law is deemed to be enacted within the relevant sphere's powers, the enquiry proceeds to the last question.

### 4 Does the national or provincial legislation impede the municipality's ability to perform its task?

Section 151(4) establishes a principle that underpins all relationships between local government and other spheres of government including those discussed above. It provides that "...national or provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions".[22]

Section 41(c)(g) of the Constitution, which is to be read in the context of Chapter 3 on cooperative government, contains a message that is very similar to section 151(4): "All spheres of government... must... 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." The Constitutional Court applied this

[22] Babha remarks that 151(4) "ensures that any obstructive behaviour on the part of provincial and national government will not be tolerated". See Bhabha 1997: 16.

section in the *Public Service Amendment Act* case.[23] The Court emphasised that section 41(1)(g) is concerned with *the way power is exercised,* not with *whether or not a power exists.* It is suggested that the meaning of section 151(4) is similar. National or provincial legislation must still comply with section 151(4) of the Constitution, even it the competency existed to enact such legislation. The requirement of section 151(4) is different from the question as to whether or not the national or provincial government was competent. The competency argument deals with the question as to whether or not the national or provincial government in fact has the power to make laws on Schedule 4B or Schedule 5B matters. After it has been determined that national or provincial government has the power to make these laws, section 151(4) deals with the way in which the power is exercised.

**Breach of 151(4): invalid or inoperative?**

Section 151(4) must be located within the context of the 'override' principles of section 156(3). Section 156(3) stipulates that a by-law that conflicts with national or provincial legislation is invalid, *subject to the rule of 151(4).* In other words, a by-law that is in conflict with national or provincial legislation that does not meet the test of section 151(4), is not invalid. Conversely, it is not quite clear as to what the status is of national or provincial legislation that impedes or compromises in terms of section 151(4).

The one argument is that 151(4) functions as an 'override' clause. If national or provincial government enacts legislation on a matter where it is competent to legislate and the legislation does not pass muster under 151(4), it becomes inoperative. The other argument is that legislation that compromises or impedes a municipality's ability to exercise its powers or perform its functions is simply invalid. The second argument is to be preferred. It is difficult to conceive of an inoperative national or provincial act that compromises or impedes in terms of 151(4), which can become operative again. The strong wording of 151(4) seems to connote a permanent defect to that legislation. Again, the interpretation by the Constitutional Court of section 41(c)(g) of the Constitution in the *Public Service Amendment Act* case is instructive here.[24] The Court assessed the effect of the exercise of a power, in a manner that is contrary to this provision, as follows –

> "Although the circumstances in which section 41(1)(g) can be invoked to defeat the exercise of a lawful power are not entirely clear, the purpose of the section seems to be to prevent one sphere of government using its powers in ways which would undermine other spheres of government, and prevent them from functioning effectively. The functional and institutional integrity of the different spheres of government must, however, be determined with due regard to their place in the

[23] *Premier of the Province of the Western Cape v President of the RSA and others* 1999(4) BCLR 382 (CC).

[24] *Ibid* at para 57.

constitutional order, their powers and functions under the Constitution, and the countervailing powers of other spheres of government."[25]

The only logical conclusion is that if legislation falls foul of section 44(1)(g), it is invalid. It is submitted that likewise national or provincial legislation that constitutes an impediment in terms of section 151(4) will also be invalid.

The Constitutional Court's approach in the *Executive Council of the Western Cape* case also affirms this view. In assessing national and provincial legislative competencies over local government matters, the Court remarked that –

"[T]he powers of municipalities must...be respected by the national and provincial governments which may not use their powers to "compromise or impede a municipality's ability or *right* to exercise its powers or perform its functions.. .The Constitution therefore protects the role of local government, and places certain constraints upon the powers of Parliament to interfere with local government decisions.if an Act of Parliament is inconsistent with such constraints *it would to that extent be invalid*."[26]

For example, when a provincial act in terms of section 155(7) on a Schedule 4B matter amounts to more than 'regulation', it will simply be invalid because provincial government legislates outside of its competency. However, even when the act does not amount to more than 'regulation', but the *way* in which the power is exercised constitutes an impediment, it will also be invalid for it falls foul of section 151(4) of the Constitution. But also the exercise by national government of its general powers in terms section 44(1)(a)(ii) or 44(2) can be challenged if it impedes or compromises local government in terms of section 151(4) and can consequently be invalid.
If the national or provincial act does not compromise or impede local government, the answer must be that, in terms of section 156(3), the by-law is invalid and the provincial or national act prevails.

**Assignment of Powers to Local Government**

The second part of the article deals with the secondary source of power for local government, namely assignment. When the new premier of the Western Cape took office in January 2002, he vowed to "devolve[e] as many provincial functions as possible onto local authorities which have the capacity to perform them".[27] According to the Premier, poverty must be fought at local level. This is in line with the

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[25] *Ibid* at para. 58.

[26] *The Executive Council of the Province of the Western Cape v The Ministerfor Provincial Affairs and Constitutional Development of the Republic of South Africa* BCRL 1999

[27] 'Highs and lows of Peter Marais' *Business Day* (18 January 2002).

commitment to building a strong local government sphere where delivery on the promise of development must take place. *Assignment* is the most important way of bringing functions down to local government. This part discusses the legal framework for assigning powers and responsibilities to local government.

**Why is assignment important?**

The functioning of municipalities is compromised if responsibilities are given to municipalities without resources. Internationally, one of the biggest problems that local authorities experience is the dreaded 'unfunded mandate'.[28] It is also important that the responsibilities of national, provincial and local governments are clear: uncertainty over who does what leads to inadequate service delivery.[29] Clarity over assignments, the procedures, their content and impact is therefore important. This article examines the legal framework for assignment of powers to local government. Section 156(1)(b) provides that a municipality has authority over any other matter assigned to it by national or provincial legislation. There are -

- general assignments (ie. to local government in general); and
- assignments to individual municipalities.

There are two more sources of power, namely delegation in terms of section 238 of the Constitution and contractual agreements (agencies). However, the article does not deal with these.

**Assignment: The Legal Provisions**

The legal regime for assignment is regulated in the Constitution and in sections 9 and 10 of the Municipal Systems Act.[30] There are three categories of assignment. The distinction between the three categories is important because it determines the applicable legal framework.

**General assignment of legislative and executive powers**

Section 156(1)(b) of the Constitution, the general provision on assignment, is the basis for national or provincial legislatures to assign matters to local government by legislation. This means that a national Act of Parliament would assign a matter, that falls outside of Schedule 4B or Schedule 5B to the entire local government sphere. An example could be an Act that stipulates that 'low cost housing' (part of the 4A competency 'Housing') is assigned to local government. This would mean that municipalities are afforded the power to administer and regulate 'low cost housing' as a competency of their own. A provincial legislature can do the same and assign a matter to the local government sphere in the province. This would result in all

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[28] Rondinelli D, Nellis J and Cheema G *Decentralization in developing countries: a review of recent experience* Worldbank research working paper 1983 at p 49.

[29] See also *Grootboom and others v Oostenberg Municipality and others* 2000 (3) BCLR 277 at para 40.

[30] Curiously, the Systems Act assumes that only provincial or national *executives* can initiate assignments. It is unclear what the application is of section 9 and 10 when the assignment of legislative power is initiated by a member of a provincial legislature or by the National Assembly in accordance with section 55(1) or 119 of the Constitution.

municipalities in that province having the power to administer and regulate that particular issue. The assignment of legislative power does not mean that there is an *obligation* on each municipality to adopt by-laws on the topic. However, the assignment does not have to be a blanket transfer: national or provincial government can circumscribe the legislative power in the assignment act.

The Systems Act provides for a number of requirements to general assignments by legislation. Before introducing the Bill in Parliament, the relevant (Deputy) Minister must -

1. publish the Bill for public comment;
2. consult with the Minister for Provincial and Local government, the Minister of Finance and SALGA; and
3. request an assessment of the financial implications from the Financial and Fiscal Commission.[31]

Further, the (Deputy) Minister, initiating the assignment must assess:

1. whether the assignment imposes a duty on the municipalities concerned;
2. whether the duty falls outside Schedule 4B and 5B; and
3. whether the performance of the duty has financial implications.[32]

If the answer to these three question is positive, the (Deputy) Minister must 'take appropriate steps to ensure sufficient funding, and capacity building initiatives as may needed, for the performance of the assigned function or power by the municipalities concerned'.[33]

The above also applies to the general assignment *by a province* to the municipalities in that province. The MEC who initiates the assignment must do the same, albeit that he or she must consult with the *provincial* MECs for local government and finance and with organised local government *in the province*.[34]

**Individual assignments of legislative power**

In terms of section 44(1)(a)(iii) and 104(1)(c) of the Constitution, national or provincial legislatures can assign legislative power to *specific* municipal councils.[35] This means that a national Act of Parliament would assign legislative power over a particular issue to an individual municipal council. For example the national government could assign the power to regulate 'Animal control' (a Schedule 4A

[31] S 9(1).

[32] S 9(3); In answering the question about the financial implications, the assessment of the Fiscal and Financial Commission must be considered. The question as to whether or not the duty falls outside 4B and 5B (s 9(3)(b)) seems irrelevant. Section 154(1)(b) allows for any matter *other than those listed in 4B and 5B* to be assigned by legislation. Assignment would in any event be superfluous if the matter falls within 4B or 5B: in that event, local government has the original power.

[33] S 9(3).

[34] S 9(2),(3) and (4).

[35] For Parliament, this excludes the power to amend the Constitution.

matter) to a municipality. This would give that municipality to right to regulate those matters within its area of jurisdiction.

Provincial legislatures could do the same. For example, the Western Cape Provincial legislature could assign the legislative power over 'Libraries' (a Schedule 5B matter) to a municipality. This would give that municipality the right to regulate libraries in its area of jurisdiction. Importantly, this refers to an assignment of a legislative *power*. A legislative power is discretionary. The municipality 'on the receiving end' of the assignment cannot be compelled to legislate. However, the scope of the municipality's legislative power can be circumscribed in the act.

A national minister initiating the assignment must consult the Minister for Provincial and Local Government before introducing the Bill in Parliament.[36] An MEC initiating the assignment must consult the MEC for local government in the province before introducing the Bill. The Minister or MEC, initiating the assignment must assess whether or not it imposes a duty, whether or not the duty falls outside Schedule 4B and 5B and whether there are financial implications. If the answer to those questions is positive, the Minister or MEC must take appropriate steps to ensure sufficient funding and capacity building initiatives.[37]

**Individual assignments of executive power**

Sections 99 and 126 of the Constitution allow national and provincial Ministers to assign executive powers to specific municipal councils. This mode of assignment differs from the previous assignments in a number of ways:

1. It concerns *executive* powers only and no legislative powers.
2. It entails a compulsion: the relevant sections speak of the assignment of a matter 'that is to be exercised'. Therefore, whereas the assignment of legislative power allocates *discretionary* powers, the assignment of executive power allocates a *duty* to do something.
3. This is why it must be concluded *by means of an agreement* with the municipality.

The national minister initiating the assignment by way of an agreement must consult the Minister for Provincial and Local Government before concluding the agreement.[38] If the assignment imposes a duty that falls outside of Schedule 4B and Schedule 5B and it has financial implications the minister must ensure funding and capacity building.[39]

Similar conditions apply for provincial MECs initiating the assignment: there must be an agreement and the MEC initiating the assignment must consult the *national*

[36] S 10(1).
[37] S 10(3).
[38] S 10(1)(b).
[39] S 10(3).

Minister for Provincial and Local Government before concluding the agreement.[40] At first sight, the requirement in section 10(2)(b) seems strange compared to the logic of sections 9 and 10: why would the MEC have to consult with the national Minister before assigning by agreement when he or she has to consult with the provincial MEC for local government before assigning by legislation. The rationale must lie in the absence of the checks and balances associated with the legislative process. This necessitates consultation with a 'higher' organ in the instance of assignment by agreement, which is an executive act. If the assignment imposes a duty, with financial implications, which falls outside of Schedule 4B and Schedule 5B the MEC must ensure funding and capacity building.[41]

Why are the MEC and the Minister obliged to ensure funding and capacity building if the municipality must, in any event, agree to the assignment? One would expect that a municipality does not agree to the assignment of a duty, unless it is convinced that these measures have been taken. However, in light of the commitment to a strong developmental local government with municipalities that are mature partners of provincial and local government, the obligation appears necessary. A specific statutory obligation will strengthen municipalities in their negotiations with other spheres of government around the assignment of duties.

**Subsidiarity**

Section 156(4) of the Constitution adds an important dimension. It entrenches the principle of subsidiarity. This principle means that a government function should be performed as close to the people as possible. Section 156(4) makes assignment by agreement of the administration of a Schedule 4A or 5A matter to a municipality by national and provincial government compulsory if -

- the matter would be most effectively administered locally; and
- the municipality has the capacity to administer it.

Does this mean that the municipality can make by-laws on matters that were assigned in terms of section 156(4)? The text and context of the provision suggests otherwise. The assignment must be effected *by agreement*. A legislative power cannot be transferred by agreement.

**Assessment: Preventing Unfunded Mandates**

The rationale behind the above procedures and requirements appears to be the 'protection' of local government against the assignment of responsibilities without resources. It is early days to speculate on the effectiveness of this protection. The value of the provisions will depend on the stakeholders' commitment to effective local government.

[40] S 10(2).
[41] S 10(3).

**Procedural and substantial requirements**

The requirements can be broken up in procedural and substantial requirements. The *procedural requirements* relate to the mandatory consultation with provincial and national finance ministers, ministers responsible for local government, organised local government or with the Financial and Fiscal Commission. In the case of the general assignments there is also the requirement of publication in terms of section 154(2) of the Constitution. Procedural requirements are no absolute quarantee for adequate protection against unfunded mandates. The effectiveness of this protection will depend on, *inter alia,* -

- the degree to which the organ of state that initiates the assignment takes serious the consultation and the arguments proffered by the agencies that are to be consulted. For example, how much time will be allowed for preparing input, at what stage of the preparation process are the various agencies involved, do they have real input or will they be faced with faites accompli?
- the degree to which consulted agencies are able and willing to bring forward coherent and convincing arguments, protecting local government against unfunded mandates and the degree to which they in fact have that agenda. Organised local government will certainly have the protection against unfunded mandates high on its agenda. However its capacity to advocate local government's interest in assignment issues is still an uncertain variable.

The *substantial requirements* relate to the 'appropriate steps' that the MEC or the Minister must take to ensure funding and capacity building. This appears to be a stronger and more direct protection against unfunded mandates. It is an implementation of the provisions in the Constitution that instruct provincial and local government to support the capacity of local government. The protection is phrased in a mandatory wording. The courts have already said that the duty to support is enforceable in court.[42] In the extreme case, when all other avenues have been exhausted, a municipality can challenge an assignment in court on the basis that 'appropriate steps' were not taken. However, the requirement does not relate to 'outcome' (namely the *presence* of sufficient funds or capacity) but to 'input' *(appropriate steps* to ensure sufficient funding and initiatives to build capacity). It is likely that a court would only test whether or not the measures taken to support the municipalities were 'reasonable'.

However, the constitutional mandate of developmental local government and the pernicious effect that loading unfunded responsibilities on local government has on the implementation of this paradigm should inform the assessment of these requirements.

[42] *MEC for Local Government, Mpumalanga v IMATU* 2002 (1) SA 76 (SCA); see also Steytler 2002: 13.

**Explicit assignment**

One of the critical problems that make this intricate scheme difficult to implement and monitor is the fact that assignments are currently not explicitly formulated as such. Legislation that is tabled in national or provincial Parliaments does not always state upfront that a function is being assigned. Whether or not powers or functions are in fact being assigned is thus a matter of legislative interpretation. This makes the division of responsibilities between spheres of government unpredictable and unclear. It also compromises the implementation of the safeguards against unfunded mandates. This can probably be explained by the lack of knowledge at departments other than those responsible for local government about the new local government dispensation. In addition, there is a lack of co-ordination between departments around matters affecting local government. National and provincial departments of local government have a crucial role to play in ensuring that these safeguards do not have a hollow ring to them.

For example, when the Law Commission formulated proposals to review the Child Care Act,[43] it proposed, amongst other things, to oblige local government in terms of a new children's statute to

> "keep a register of the total number of children and record their ages, in its area of jurisdiction."[44]

The obligation on local government to keep this kind of register falls outside of its original power to regulate and administer 'child care facilities'.[45] An assignment would be necessary. The Law Commission's proposal does not refer to or acknowledge the need for an assignment. Local government might be the most appropriate sphere of government to perform such a function. However, the imposition of such a duty on local government would have enormous administrative and financial implications. The mere formulation in national legislation of such a duty on local government is unconstitutional and not in keeping with the system of intergovernmental relations. Since it would concern an assignment of a specific duty and not the assignment of legislative power, it would have to be done in terms of section 99 or 126 of the Constitution. This means that it would have to be preceded by an obligation on the relevant ministry to perform that task. Subsequently, the Minister would have to assign in terms of sections 99 or 126 *to specific municipalities,* subject to agreement and the requirements of section 10 of the Systems Act.

The application of these sections should not depend on a municipality challenging an assignment in court or elsewhere. Rather, it should be an integral element of the

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[43] Act 74 of 1983;

[44] Law Commission, *Review of the Child Care* Act, Discussion Paper 103 (Project 110) at paragraph 9.7.4 available at www.law.wits.ac.za; see also Zaal and Matthias 2002: 149.

[45] Schedule 4B of the Constitution.

system of intergovernmental relations, which includes respect for institutional integrity and prior consultation over measures that stand to affect local government.

**Interface between subsidiarity and section 10 of the Systems Act**

If a particular matter *must* be assigned because the requirements of the subsidiarity principle of section 156(4) are met, what is then the role of section 10 of the Systems Act? Should that procedure still be followed? If, for example, one of the unicities successfully 'claims' the assignment of the administration of Libraries on the basis of section 156(4), should the relevant provincial minister still follow the procedure set out in section 10? Section 10 refers to an assignment 'initiated' by the provincial or national executive? Can it still apply to an assignment 'initiated' by a municipality? It could be argued that the two provisions exclude one another: section 156(4) applies when capacity to administer exists, therefore the requirements in section 10 around the assessment of financial implications, capacity building etc. do not come into play.

It is suggested that the two should not be interpreted to be mutually exclusive but rather harmoniously and against the backdrop of the need for strong, developmental local governments. Section 156(4) is a general principle and not the outline of a procedure to assign. Section 156(4) should prompt a national or provincial executive to put the process of section 10 in motion rather than to replace it.

**Assessment**

This article attempts to demarcate local government's legislative powers over Schedule 4B and 5B matters by putting forward a test that gives content to section 156(3) of the Constitution. Litigation on this topic is not necessarily flowing thick and fast as yet. However, as local authorities find their feet in the new dispensation and start asserting their constitutional status, conflicts over local government powers will increasingly find their way to court. The City of Cape Town's court challenge over national government's powers to regulate 'electricity reticulation', a Schedule 4B competency, is a case in point.[46] Further, the legislative framework for assignment of powers to local government is discussed. The requirements for assignment are a novel way of attempting to prevent unfunded mandates to local government. However, the usefulness of these requirements depend on whether they are taken serious by provincial and national governments and on whether assignments will be undertaken explicitly. Local government is no longer the stepchild of national and provincial government. It is now a mature partner of national and provincial government. The Constitution replaces the direct control by and accountability to senior governments with accountability to the local electorate. It is only when local government is afforded substantial regulatory powers that the notion of development, driven at local level, can really take root. Local government must be allowed to govern, make mistakes, learn from its mistakes and, importantly, establish a sound and interactive relationship with its citizenry. If local government is forever treated as an infant

[46] Johnson 2002: 3.

sphere of government and is subjected to constant legislative interference in its original powers it cannot live up to the challenge of bottom-up development that is envisaged by the Constitution.