



PAPER I: INSTITUTIONAL SUBSIDIARITY IN THE CONSTITUTION

Slapstick asymmetry or a 'rights-based' approach to powers?

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INSTITUTIONAL SUBSIDIARITY IN THE CONSTITUTION ¹

EXECUTIVE SUMMARY

What is subsidiarity?

Subsidiarity is a general principle that says that governance should take place as close as possible to the citizens. It translates into protection of lower levels of government against undue interference by other spheres and into a preference for placing functions and powers at lower levels of government where possible. The South African Constitution was influenced by this principle even though it is not mentioned explicitly. The role of local government, for example, is secured in the Constitution. National and provincial governments may not interfere in local government without good reason. These notions are in line with the subsidiarity principle. There is one particular provision of the Constitution that may be understood in light of the subsidiarity principle, namely section 156(4). It provides, in broad strokes, that national or provincial government “must” assign certain functions to a municipality if certain, specified circumstances are met.

Why a principle on subsidiarity?

In its earliest days (19th century) the principle was introduced out of respect for the individual and for small groups and associations that played important roles in society, such as families, churches, guilds but also villages, towns and provinces. More recently, the principle has been motivated on the basis of more practical concerns such as efficiency in government spending. The argument is then that lower levels of government are closer to the citizen and can therefore make more ‘intelligent’ decisions on what the citizens want. The overall objective for governments to adhere to the principle is to make the decision about ‘who does what’ less about politics and more about principles.

International manifestation of the principle

The principle is very prominent in the European Union (EU) where powers are exercised by the central EU bodies only if they cannot be exercised by the Member States themselves. The EU institutions thus have to prove that ‘centralisation’ is

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necessary; otherwise the function remains with the Member State. This is entrenched in EU treaties. Internationally, the principle is also quite often recognised as important in the development of local government systems. European Charter on Local Self-Government and the Commonwealth Aberdeen Agenda contain provisions on the subsidiarity principle.

It is important to note that the subsidiarity with regard to local government usually appears in a ‘watered down’ version. Firstly, it is based on efficiency arguments rather than notions of liberty or autonomy. Secondly, it does not appear as an automatic bias or ‘default’ position for local government, but rather as an instruction to seriously consider devolution.

The experience with the subsidiarity principle internationally is a mixed bag. It has great political and symbolic value and thus influences discussions on the division of functions. However, nowhere has it been legally enforced. Also, it has not succeeded in taking the politics out of the discussions on the division of powers. In fact, it sometimes sharpens and intensifies political disagreement across levels of government over who does what.

What about section 156(4)?

The Constitution displays special concern for the role of local government, protects its status and encourages, in section 156(4), national and provincial governments to transfer functions to local government where possible. However, it is suggested that this must be viewed in the context of the quest for developmental municipalities rather than as a classic subsidiarity principle such as the ‘EU version’ of it. The classic subsidiarity principle says that powers *must* go to or stay at local level unless they are better performed at a higher level. The Constitution, and particularly section 156(4), does not go that far; it allocates powers to local government and provides that more can be added if that is appropriate. The burden of argument is thus turned around.

Is it legally enforceable?

Can a municipality go to court and claim the right to exercise, for example, the housing function on the basis of section 156(4) of the Constitution? No court has yet pronounced itself on that question. However, the suggestion here is that section 156(4) is not enforceable as a self-standing ground for legal action. Firstly, courts will, before hearing a dispute on the location of functions, insist that the parties try to solve their dispute otherwise. Secondly, if dispute resolution does indeed fail, the courts may still be very reluctant to be drawn into technical debates on whether a function should go to a municipality. These debates will deal with issues such as the efficiencies generated by municipal performance of the function, intergovernmental fiscal consequences, economic imperatives such as spill-over effects, capacity assessments of municipalities etc. South African Courts are generally neither equipped nor eager to get embroiled in intricate governance issues for which there are other avenues towards solution. This is different only if there is a manifest violation of the Constitution. A programmatic approach to functions and powers, managed through intergovernmental relations rather than by the courts fits in better with the Constitution. A 'rights based' approach to section 156(4) of the Constitution may result in 'slapstick asymmetry'; municipalities lodge claims for powers for a variety of reasons and powers 'tumble up and down' between national, provincial and local government. The only referee is a judge with the unenviable task of mediating the endless intricacies of governance. It is hardly conceivable that this scenario will contribute to the achievement of the goals of developmental local government.

Section 156(4) in and of itself can thus not be a cause for legal action. This does not mean, however, that the principle of subsidiarity plays no role in lawmaking, governance or judicial adjudication of competency disputes. It is envisaged that the principle should play a role for government in adopting and amending the Constitution and in the application of the framework for assignment and delegations as outlined in the Constitution. Furthermore, it should play a role for the Courts in interpreting competencies and assessing compliance with intergovernmental consultation around assignment.

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INSTITUTIONAL SUBSIDIARITY IN THE CONSTITUTION

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1 INTRODUCTION

The division of functions and powers between the three spheres of government is an important element of the current review of provincial and local government, conducted by the Department of Provincial and Local Government. This discussion extends to a review of the ‘original’ powers and functions of the three spheres but also to the devolution of additional powers and functions to provinces and, in particular, to municipalities. In this discussion about the division of functions and powers between spheres of government, section 156(4) of the Constitution occupies an interesting role. It provides, in broad strokes, that national or provincial government “must” assign certain functions to a municipality if certain, specified circumstances are met. It is the compulsory wording of the provision that sets the provision apart from the general provisions on transferring additional powers and functions to local government.²

This provision may cause anxiety on the part of national and provincial governments; the notion of ‘devolution by court order’ would render any government uncomfortable. On the part of local government, it may also cause anxiety because of a fear for unfunded mandates. However, it may also be a reason for enthusiasm, particularly on the part of the well-resourced, ambitious municipality that identifies opportunities for accelerated devolution.

It is often said that the underlying rationale for this provision is the principle of subsidiarity. This paper explores the connection between section 156(4) of the Constitution and the principle of subsidiarity as it is found in legal theory. The paper briefly explores the historic background of the principle as well as its articulation in various domestic and international instruments.

It will be argued that, despite the fact that the connection is tenuous, it may assist in the interpretation of this provision. Equipped with this appreciation of the connection

² For a discussion of transferring additional powers and function to local government see Steytler and De Visser 2007, 39-49.

between subsidiarity and section 156(4) of the Constitution, the paper provides some suggestions on its application.

2 DIFFERENT MODES OF SUBSIDIARITY

Before proceeding to the analysis of section 156(4) of the Constitution, it is necessary to distinguish various modes of subsidiarity. It is suggested to distinguish between strategic subsidiarity, jurisdictional subsidiarity and institutional subsidiarity.

2.1 Strategic subsidiarity

Du Plessis (2006, 209) introduces the concept strategic subsidiarity as a principle of legal interpretation; if two or more legal norms are applicable to a given situation, an external directive may instruct one of those legal norms to ‘step down’. The permission to use force to make an arrest, only in instances where no lesser means are available is an example of the application of strategic subsidiarity. Another example is the principle that holds that, where it is possible to solve a case without reaching a constitutional issue, the case must be solved that way (without recourse to constitutional argument).

2.2 Jurisdictional subsidiarity

Jurisdictional subsidiarity is another expression of the broader subsidiarity principle. For example, the notion that the Constitution Court leaves the development of common law to the Supreme Court of Appeal (Du Plessis 2006, 11), can be regarded as an application of the principle of jurisdictional subsidiarity. Generally, it is said that the South African court structure, much like the German court structure, is based on the subsidiarity principle (Carpenter 1999, 46); matters are referred to a higher court only if the court *a quo* is prevented from hearing the matter (Van Wyk 1998, 255).

The above two varieties of the subsidiarity principle are not the focus of this paper as they are not directly relevant to understanding section 156(4) of the Constitution. However, they both represent a trend that underlies all varieties of the subsidiarity principle, including the expression of subsidiarity in section 156(4) of the Constitution.

This trend may be curtly described as ‘an automatic bias towards the small that only gives way to a reasoned argument for the big’. It will be argued below that there are important nuances to be made in the manner in which section 156(4) expresses this notion.

2.3 Institutional subsidiarity

Section 156(4) of the Constitution is connected to the variety of subsidiarity that may be termed ‘institutional subsidiarity’. Du Plessis (2006, 209) defines institutional subsidiarity as the identification and empowerment of an appropriate institutional actor to perform a certain function. He remarks that the principle “constrains any more encompassing or superordinate institution (or body or community) to refrain from taking for its account matters which a more particular, subordinate institution (or body or community) can appropriately dispose of, irrespective of whether the latter is an organ of state or civil society” (Du Plessis 2006, 209). It thus also contains an automatic bias towards the small that only gives way to a reasoned argument for the big.

3 ARGUMENTS FOR INSTITUTIONAL SUBSIDIARITY

The argument for institutional subsidiarity can, and has been peddled from various angles, denominations and beliefs. What follows is a quick survey of some of the most important historic and philosophical foundations for the principle of institutional subsidiarity.

3.1 Liberty and roman catholic social philosophy

The subsidiarity argument has been advanced on the basis of the fundamental value of liberty and the sovereignty of the individual. The liberty rationale for subsidiarity holds that communities, religious associations and cultural associations are important for supporting the needs of the individual (Føllesdal 1998, 200-207). This justifies institutional subsidiarity as a principle for non-interference in families, voluntary associations, such as guilds and unions but also in cities, provinces and states.

Institutional subsidiarity also has a religious heritage, namely in catholic social philosophy. In fact, the subsidiarity principle was first articulated in the context of this

religious social philosophy (Van Wyk 1998, 254). In as early as 1891, Pope Leo XIII placed great emphasis on the importance of the individual and the family. Voluntary associations were deemed of equal importance to the individual and the family as they are necessary for the development of individual dignity and for assisting those who lack ways or means of developing (Føllesdal 1998, 207-208). State intervention into matters of the individual, the family and voluntary associations that is not absolutely necessary to protect the common good or prevent injury is thus rejected. Pope Pius XI (1931, para 79) is widely credited for the first articulation of the catholic principle of (institutional) subsidiarity due to the following, rather imposing, phrase:

[i]t is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organisations can do.

The catholic rationale was that power should be left to individuals, voluntary associations and families because they are more likely to exercise that power in a wise and socially useful manner (Barber 2005, 314).

Section 156(4) of the Constitution obviously differs from the above two expressions of subsidiarity in that it refers to the relationship between spheres of government, more specifically, between national and provincial governments and local government. The principle of subsidiarity as defined in the liberty and catholic argument is not limited in scope to public bodies but includes civil society (Van Wyk 1998, 255; Barber 2005, 311) and in fact also extends fundamentally to the relationship between the state and the individual (Van Wyk 1998, 258).

The focus of this paper is on a more limited form of institutional subsidiarity, namely its application to public institutions. Even more specifically, the focus is on the application to public institutions that have a deliberative element.

3.2 Fiscal federalism

Contemporary arguments for institutional subsidiarity can also be launched from the platform of fiscal federalism; public goods should be produced by the government

that has jurisdiction over the area where that good is ‘public’. The objective in this argument is different and perhaps somewhat less noble than in the two arguments above; the goal is to achieve the greatest possible efficiency in decision making (Føllesdal 1998, 205).

3.3 Democracy

The democratic equivalent to the fiscal federalism argument holds that the people that participate in the deliberative process on the delivery of a public good should be those people that have a significant interest in the delivery of that public good. If too many people with an insignificant interest are included, the deliberative process becomes over-inclusive and democratic control is diluted as a result.

The above four rationales based on liberty, catholic social philosophy, fiscal federalism and democracy appear to be the most commonly used arguments to explain the roots and operation of the subsidiarity principle. It is argued in this paper that not all rationales apply with equal force to the South African Constitution and to section 156(4) in particular. The fiscal federalism or ‘efficiency’ rationale appears to top the list in this regard. It is suggested that this has consequences for the interpretation of section 156(4) of the Constitution. However, before this argument can be outlined, it is necessary to further narrow down and define the principle of subsidiarity as it is expressed in section 156(4) of the Constitution.

4 FIELD OF APPLICATION

What does a principle of subsidiarity do? How does a ‘bias for the small’ manifest itself? It is suggested to distinguish three areas of intergovernmental relations where the principle has an effect, namely the protection of competencies, co-operative decision making and the allocation of competencies.

Protective subsidiarity holds that central government should not unduly interfere in subnational matters. Participative subsidiarity provides a rationale for subnational participation in central decision making; should subnational governments have ‘a veto, votes or voice’ in national government decision making? Finally, allocative

subsidiarity relates to the bias for subnational entities when it comes to the allocation of powers and functions.

With the isolation of the allocative principle of subsidiarity we have arrived at the essence of section 156(4). The allocative principle of subsidiarity manifests itself as a logic for regulating the location of competencies at a central or decentralised level. It may thus play a role during the formulation or amendment of a Constitution in that it calls for a bias towards decentralised exercise of powers and functions (Carpenter 1999, 46; Van Wyk 1998, 256). It may also play a role in the interpretation of competencies and insert the same logic, namely a bias towards the decentralised unit, into the interpretation of competencies. Lastly, it may play a role in discussions surrounding the transfer of functions from central government to subnational governments. Section 156(4) of the Constitution deals specifically with the last as it posits a mechanism for a ‘compulsory’ transfer of functions to a municipality.

5 EFFECTS OF THE PRINCIPLE OF INSTITUTIONAL SUBSIDIARITY

The general principle of institutional subsidiarity can, if applied successfully, have one of a number of effects. Firstly, it can have a proscriptive effect in that it proscribes certain ‘senior’ government action or the extension of government action into a particular functional area. Secondly, it can be a prescriptive effect in that it may require national government action; if the application of the principle dictates that a particular area is not suitable for local government activity it therefore requires of a ‘senior’ government to occupy that space. Similarly, the application of the principle may require national government action to take action that empowers lower levels of government. It has also been argued that institutional subsidiarity can have a ‘creative’ effect in that the application of the principle may demand the establishment of new structures Barber (2005, 319). If there is mismatch between the exercise of public power and the constituency affected by the power and this mismatch cannot be resolved by relocating the power to another existing structure, a new structure may need to be established.³

³ Van Wyk (1998, 256) argues that subsidiarity can have an impact on structure which is understood to refer to a similar ‘creative’ application of the principle. While this principle may tune in with the

6 OBJECTIVE

Føllesdal describes the overall objective of institutional subsidiarity as reducing the risk of a ‘permanent minority status’ (1998, 191). In the context of this paper and its reflection on section 156(4) of the Constitution, this refers to the risk of a permanent ‘minority status’ of local government. The allocative variety of institutional subsidiarity seeks to help generate a systematic deliberation about the division of functions with a distinct logic based on a bias towards subnational government.

Its track record, however, on achieving this particular objective is not impressive. Føllesdal remarks that “rather than reducing and removing fundamental political conflicts, the principle of subsidiarity increases and shapes such tensions” (1998, 190). When it comes to subsidiarity, representatives of all political and intergovernmental persuasions usually agree enthusiastically with the principle. However, they are likely to disagree bitterly over how it ought to be implemented. For example, the principle may be employed by subnational units as a lever to engage in intergovernmental politicking; claims for authority based on subsidiarity actually mask a quest for political point-scoring. Conversely, the principle may be used by senior governments to shed responsibility; the subsidiarity rhetoric is then used to conceal a drive towards loading functions onto local government. In sum, the ability of the subsidiarity principle to ‘objectify’ a discussion on functions and powers should not be overstated.

7 MANIFESTATIONS OF THE PRINCIPLE IN LOCAL AND INTERNATIONAL INSTRUMENTS

In this part of the paper, the most important manifestations of the allocative principle of institutional subsidiary are discussed. It is safe to say that the contemporary subsidiarity principle owes its popularity to both Germany and the European Union, which is why these two jurisdictions are discussed. Subsequently, expressions of the principle in formal and informal international instruments are examined.

thinking on new regional configurations, such such as Gauteng’s Global City Region, it is not further explored in this paper.

7.1 Europe

The principle gained political currency in the European Union since the late 1980s when it was introduced in response to fears of European centralisation. The German Länder were afraid of the effects that Europeanisation would have on their federal system (Van Wyk 1998, 253; Føllesdal 1998, 191). The principle thus entered the European polity on the back of the federal idea as espoused in Germany. The 1992 Maastricht Treaty on the European Union and the 1997 Treaty of Amsterdam codified the principle into the Treaty of the European Community:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond that what is necessary to achieve the objectives of this Treaty.⁴

It emphasises the recognition of the sovereignty of the Member States that comprise the Union. It does this in much the same way as the liberal and catholic rationales for subsidiarity emphasise the sovereignty of the individual, the community, the association, the city and the province that comprise the state. A more general expression of the principle is found in article 1 of the Treaty of the European Union which states that decisions will be taken ‘as closely as possible to the citizen’.

Barber identifies three operative elements in article 5 of the Treaty of the European Community. Firstly, there is preference for power to be allocated to the smaller unit. Second, this allocation is qualified by an efficiency test; power should be shifted downwards unless centralisation will result in efficiency gains. Third, the efficiency test is, in turn, qualified by the instruction that the gains must be sufficient, i.e. of a certain minimum level to warrant centralisation (2005, 311).

⁴ Article 5, Treaty of the European Community.

The symbolic and political importance of the subsidiarity principle in the European polity is undisputed; it is regarded as a principle that reveals the roots and identity of the European project (Barber 2005, 308). However, it has proved to be difficult to enforce legally. It has certainly not been vigorously enforced by the Courts. The most elaborate judicial discussion of the principle spans 9 paragraphs in *R v Secretary of State for Health, ex. Parte Imperial Tobacco*.⁵ Barber (2005, 324) concludes that –

[a]s a legal principle, a justiciable constraint on the power of the Community Institutions, subsidiarity has had little obvious effect. Perhaps daunted by the complicated political assessments the principle entails, or less charitably, perhaps disinclined to develop a principle that limits the centralisation of power, the European Court has not made use of the principle.⁶

7.2 Germany

As Van Wyk (1998, 256-259) points out, a number of features in the German Basic Law can be highlighted as manifestations of the subsidiarity principle. Firstly, article 70(1), which provides that the Länder have the power to legislate insofar as the Basic Law does not confer legislative powers on the Federation is an expression of the allocative principle of subsidiarity. The same applies to the provision that, where the Länder and the Federation have concurrent legislative powers, the Länder may legislate as long as, and to the extent that the Federation does not use its legislative power.⁷ A third expression of the allocative principle of subsidiarity is the provision that the Federation may only legislate on concurrent matters under certain circumstances, namely-

- if such matter cannot be effectively dealt with by the legislation of individual Länder;
- if dealing with a matter by Land law might prejudice the interests of other Länder or of the entire community, or
- if the maintenance of legal or economic unity, especially the maintenance of uniformity of living conditions beyond the territory of a Land necessitates it.

⁵ Case C-491/01, *R v Secretary of State for Health, ex. Parte Imperial Tobacco* [2002] ECR I-11453, 177-185.

⁶ Footnotes omitted.

⁷ Article 72(1) German Basic Law.

The power of the Federation to pass framework legislation on certain Länder competencies, which has been abolished as a result of the federal reform of 2006, was also a manifestation of the subsidiarity principle. This limit on Federal legislative power stems from a 'bias for the small', i.e. the Länder. Finally, the provision that permits the Länder to executive Federal laws "as matters of their own concern" insofar as this Basic Law does not otherwise provide or permit, can be pointed out as an expression of subsidiarity.

The above features all concern the role of the Länder vis-à-vis the Federation and don't have an immediate impact on the powers of local government. However, one provision in the Basic Law deals specifically with local government and can be seen as an expression of institutional subsidiarity with regard to local government. Article 28(2) provides that "The communities must be guaranteed the right to regulate on their own responsibility all the affairs of the local community within the limits set by law. The associations of communities also have the right of self- government in accordance with the law within the limits of the functions given them by law." It is suggested that the explicit guarantee for "associations of communities" to have the right of self- government harks back to the historic origins of subsidiarity discussed above.

7.3 Local Government instruments

The subsidiarity principle has found expression in a number of international instruments that seek to promote local government.

7.3.1 United Cities and Local Governments of Africa

The recently established United Cities and Local Government of Africa has sought to embrace the notion of subsidiarity in its founding documents. For example, in its Memorandum for recognition by the African Union, the United Cities and Local Governments of Africa argued that "local governments can only be maximally effective in a context *where they are a distinct but subsidiary sphere of government recognised as such constitutionally or legislatively*" (UCLGA 2005). Generally, the UCLGA has adopts the "distinct but subsidiary" maxim as a rally for constitutional recognition. The juxtaposition of distinctiveness and subsidiarity connotes a

somewhat twisted version of the subsidiarity principle which says that local government is a subsidiary of national government. As will be clear from the above discussion of the arguments for subsidiarity, this emphasis is anathema to the notion of subsidiarity.

7.3.2 Commonwealth Aberdeen agenda

The “Aberdeen Agenda; Commonwealth Principles on Good Practice for Local Democracy and Good Governance” (CLGF 2005) was formally adopted by the Commonwealth Local Government Forum in 2005 and endorsed by Commonwealth Heads of State in the same year. It represents a set of standards to promote healthy local democracy and good governance throughout the Commonwealth.

Article 4 of the Aberdeen Agenda reads:

Defined legislative framework: Local democracy should ensure local government has appropriate powers in accordance with the principle of subsidiarity.

Democratic local government, with clearly defined powers, serves as the means by which the community can shape their livelihoods.

Effective devolution enables the views of the local community to be expressed and their views taken into account in decisions implemented to improve the quality of life of all citizens locally.

The Agenda explicitly introduces the principle of subsidiarity. It does not proffer any definition of the principle, except for introducing ‘appropriateness’ as a criterion. In its further provisions it emphasises that powers should be clearly defined. Three important notions are put forward that may shape the interpretation of the subsidiarity principle as put forward in the Aberdeen Agenda. Firstly, the Aberdeen Agenda links subsidiarity to “the shaping of livelihoods”, which relates to the ‘place-shaping’ role of municipalities. Secondly, it finds a rationale for subsidiarity in the opportunities for

community participation in decision making. Thirdly, it speaks of “effective” devolution, thereby promoting a functional approach to devolution.

The Aberdeen Agenda is a statement of commitment by the Commonwealth. It has no discernable legal application.

7.3.4 European Charter on local self-government

The clearest articulation of the subsidiarity principle with regard to local government can perhaps be found in the European Charter on Local Self-Government.⁸ This Charter is a treaty open for adoption by Members of the Council of Europe.

Article 4(3) of the Charter reads:

Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy.

The Charter does not quite contain the ‘automatic bias’ of the classic principle of subsidiarity, as it is expressed in European Union law. It rather speaks of a ‘preference’ and stipulates that allocation to another authority requires motivation. This motivation should balance the extent and nature of the task on the one hand and the requirements of efficiency and economy on the other. While the rationale for the bias towards local government is not immediately apparent from the provision (“extent” and “nature” are notoriously vague terms), the rationale for allocation to higher order must be based on ‘efficiency and economy’ arguments.

The provisions of the Charter of Local Self-Government are binding on the states that signed and ratified it. However, the legal application of the Charter is limited (Kuklis 2000, 3). The Courts in the Member States generally do not view the provisions as capable of direct application as they are not ‘self executing’; no individual person or organ of state can realistically invoke any of its provisions in a court of law. For

⁸ European Charter of Local Self-Government Strasbourg, 15.X.1985.

example, when the Parliament of the Netherlands, signatory to the Charter, adopted legislation that partly abolished property rates, the Dutch Association of Municipalities launched a challenge in the High Court. It argued that the law was inconsistent with article 9(3) of the Charter, which states that at least part of local government's revenue should be derived from taxes and charges. The High Court held that it could not test the statute against this treaty provision as it is formulated in general terms and intended to be binding on everyone.⁹ The enforcement of compliance with the Charter takes place within the confines of the Council of Europe; the Council itself assesses whether or not Member States comply Charter. It relies on reports from Member States for its monitoring as the configuration for enforcement does not include a supranational court structure (such as with regard to the Council of Europe's Convention on Human Rights and Fundamental Freedoms).

8 SUBSIDIARITY, LOCAL GOVERNMENT AND THE CONSTITUTION

After having discussed the background to the principle of subsidiarity and the manner in which it is articulated in various domestic and international instruments, the attention now shifts to the South African Constitution and section 156(4) in particular.

Neither the Constitution nor the Constitutional Court employs the term subsidiarity. In this respect, Van Wyk (1998, 260) remarks that the principle of subsidiarity was propagated during the constitutional negotiations by those who supported a federal solution. He cites this as one of the reasons why the principle was not formally embraced in the Constitution. However, many authors, writing about subsidiarity in the South African Constitution, stress that the Constitution does not establish a closed system of values and that it therefore can be argued that the subsidiarity principle is one of the values in the Constitution. Flowing from the above description of the areas of application of the principle, it has been argued that the Constitution contains a number of manifestations of institutional subsidiarity. Detailed descriptions of the various clauses in the Constitution that can be viewed as manifestations of the subsidiarity principle have been traversed in other writings (Van Wyk 1998, 262-266;

⁹ *VNG vs Staat* LJN: BA3438, High Court of The Hague at para 4.3.

Carpenter 1999, 47-53). In the context of this paper, only the manifestations of subsidiarity that relate to local government are dealt with shortly.

Firstly, the terminology in the Constitution can be viewed as the outcome of the application of subsidiarity. Van Wyk argues that the use of the term ‘spheres’ instead of ‘tiers’ renders the Constitution in principle one of the most ‘subsidiarity-friendly’ Constitutions (Van Wyk 1998, 263, 265). Section 151(4) of the Constitution is clearly connected to the ‘protective’ working of subsidiarity; national and provincial governments “may not compromise or impede a municipality’s ability or right to exercise its powers or perform its functions” (Van Wyk 1998, 266). The notions of local government representation in Parliament (s 67) and the duty of national and provincial governments to seek local government’s input in the preparation of legislation affecting local government (s 154(2)) can both be considered as the offspring of ‘participatory’ subsidiarity (Van Wyk 1998, 266).

As stated earlier, section 156(4) can be viewed as an expression of the ‘allocative’ principle of institutional subsidiarity. It provides:

The national government and provincial governments must assign to a municipality, by agreement, and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if –

- (a) that matter would most effectively be administered locally; and
- (b) the municipality has the capacity to administer it.

It has been argued that section 156(4) is “the embodiment of the principle of subsidiary” (Budhu and Wiechers 2003, 473). It is suggested that this approach requires two nuances. Firstly, the argument that section 156(4) embodies the subsidiarity principle does not do justice to the protective and participative elements of subsidiarity that appear elsewhere in the Constitution. Secondly, as will be argued in this paper, this provision does not embrace the classic concept of institutional subsidiarity but rather gives its own expression to it. This expression, it will be contended is more ‘calculated’ and ‘functional’ than the grand, principled approach to

subsidiarity in its original, historic form and its manifestation in, for example, the European Union.

9 RATIONALE FOR SUBSIDIARITY IN THE SOUTH AFRICAN CONSTITUTION

In order to understand notions of subsidiarity in the Constitution, it is useful to examine whether any of the rationales of institutional subsidiarity that were discussed earlier in this paper are relevant to guide the interpretation of section 156(4) of the Constitution. It is suggested that both the catholic rationale and the efficiency rationale deserve to be highlighted in the South African context.

9.1 Catholic rationale

Comparing a modern Constitution and something as ‘archaic’ as a 19th century Catholic argument for subsidiarity can easily be dismissed as far-fetched. However, there are some compelling linkages between, on the one hand, historic and current concepts of local government in South Africa and the values pursued by the Catholic subsidiarity on the other. Firstly, the architecture of local government before 1994 was based on the notion that the municipality as a body is made up by inhabitants of the municipality. For example, in the opening line of their work on municipal law, Dönges and Van Winsen (1953, 1) described a municipality thus:

A municipal corporation is a form of *universitas*, i.e. an aggregate of natural persons forming as a group a new subject of rights and duties, separate and distinct from the rights and duties of the individual persons who constitute the group. It is thus a legal abstraction or fiction by which the law has created a new entity out of a group of natural persons and has endowed it with a distinct juristic personality, capable of functioning in various respects as a natural person.

The ordinances established the principle that a municipality consisted of the inhabitants (or more restrictively, the ratepayers) of the municipality. For example, the Cape Municipal Ordinance of 1912 declared that the inhabitants of the municipality were the “corporators” of the body corporate – the municipality. Given

this basis, Watermeyer J had the following to say about the nature of the municipal council:

The council therefore by a Statute is made the agent of the body corporate, but the council itself is not a body corporate; it consists of a number of members whose acts are determined by the majority, and when they act collectively by resolution properly taken then they act as agents for the body corporate, the municipality.¹⁰

The dismantling of the old local government architecture and the emergence of a new local government dispensation created a notion that is not altogether dissimilar, despite the fact that it was based on a radically different rationale. Section 2(b) of the Local Government: Municipal Systems Act¹¹ (Municipal Systems Act) provides that the municipality consists of the political structures, administration *and the community* of the municipality. Historic as well as current perspectives on the notion of a municipality in South Africa thus portray the municipality not just as a public body or as a subsidiary of the national government but as an association of individuals, communities and public structures. Both historic and current perspectives of local government in South Africa thus establish a relevance of the Catholic subsidiarity which cherished the small-scale association as an essential conduit for the attainment of personal dignity.

9.2 Efficiency or functionality rationale

The expression of subsidiarity in section 156(4) of the Constitution appears to be mostly based on efficiency rather than generic, sweeping values or principles such as liberty or individual autonomy. Van Wyk remarks that the emphasis in the South African version of subsidiarity is on ‘effectiveness’ (1998, 267). Effectiveness and efficiency are not the same concepts; effectiveness connotes impact while efficiency connotes good organisation. Both can be captured under the term ‘functionality’ and it is argued that the expression of subsidiarity in the South African Constitution is strongly influenced by a concern for functionality. The inclusion of capacity as a

¹⁰ *De Villiers and Others v Beaufort West Municipality* 1924 CPD 501 at 504. See further Steytler and De Visser 2007, 1-5.

¹¹ Act 32 of 2000.

condition for the operation of section 156(4) is the clearest indication that a functionality rationale is envisaged; subsidiarity in its purest, principled form based on liberty takes no note of such factors as ‘mundane’ as capacity. However, a subsidiarity principle, based on functionality does. Also, the fact that section 156(4) recognises and encourages asymmetry, a ‘government à la carte’, is also an indication of a functional basis for this expression of subsidiarity rather than an overtly principled basis (Føllesdal 1998, 206).

One of the consequences of relying on the functionality rationale is that it renders the subsidiarity principle more amenable to arguments that larger units are sometimes more likely to reach the ‘right’ decision than smaller ones for external reasons. These external reasons do not necessarily have to be derived from dogmas surround liberty or autonomy. For example, access to an expert civil service may give a larger unit an advantage over a lower unit (Barber 2005, 320). A dogged application of subsidiarity along autonomy or liberty rationales would be less amenable to the incorporation of such arguments.

9.3 Establishing an endogenous rationale: developmental local government

Both the catholic rationale of protecting the community association and the functionality rationale of configuring an effective state are thus relevant for the interpretation of section 156(4) of the Constitution. It is argued that the Constitution itself, however, offers the strongest rationale. This rationale consolidates the catholic and functionality rationale into one that is based on the concept of the developmental local state.

If the functionality rationale is taken as a starting point, it becomes clear that functionality in and of itself is a hollow shell. Measuring effectiveness and efficiency can only be done if it is known what goals must be achieved (Barber 2005, 318). The objects of local government, as set out in section 152(1) of the Constitution are particularly instructive here. They set out the overall goals to be achieved by local government, namely to-

- provide democratic and accountable government for local communities;
- ensure the provision of services to communities in a sustainable manner;

- provide social and economic development;
- promote a safe and healthy environment; and
- encourage the involvement of communities and community organisations in the matters of local government.

It is thus suggested that subsidiarity in local government and section 156(4) of the Constitution in particular, must be understood in light of the objects of local government as set out in section 152 of the Constitution. The Constitution envisages municipalities to strive towards the abovementioned developmental goals, which take the municipal function beyond being an instrument for service delivery at the behest of national and provincial governments. This constitutional vision needs to match with a distribution of powers that ensures that municipalities are enabled to achieve these objects. The Constitution itself recognised that the distribution set forth by it may not be adequate in all circumstances. This is why it made specific provision for the transfer of powers and functions to local government or to individual municipalities. The Constitution supplements its framework for assignment with a guiding provision in section 156(4). The subsidiarity principle of section 156(4) thus exists to insert a logic that promotes a distribution of powers between spheres of government that enables the State to achieve the developmental objects of local government effectively and efficiently.

10 OBSERVATIONS ON SECTION 156(4) OF THE CONSTITUTION

The above examination of the background to the allocative principle of institutional subsidiarity as expressed in section 156(4) of the Constitution and the construction of an endogenous rationale for it should guide the interpretation of and approach to this provision. A few proposals are made below.

10.1 Limited functional scope

The Constitution makes it clear that the blessings of small government apply to certain functional areas, not all. The functional scope of institutional ‘allocative’ subsidiarity is limited. The Constitution limits the scope of its application to Schedule 4A and 5A matters, at the exclusion of the residual national matters. The normative value of the subsidiarity principle is thus limited. This limitation, it is suggested, further supports the contention that the normative value of the institutional allocative

subsidiarity principle is less pronounced; to the extent that the principle is expressed in section 156(4), this is borne out of concerns for efficiency rather than liberty or individual autonomy. Institutional allocative subsidiarity appears to be a ‘calculated’ premise rather than an overtly principled one.

10.2 A-political subsidiarity?

It appears from the brief description of the experience with subsidiarity that its ability to neutralise the politics around division of powers and functions should not be overestimated. It may thus be appropriate to caution against viewing section 156(4) as the Constitution’s best kept secret on how to approach devolution of powers and functions; it does not contain a recipe for the alchemy of optimal division of functions.

10.3 Preference rather than automatic bias

Section 156(4) of the Constitution does not fit in well with the basic notion of ‘a bias for the small that gives way only to a reasoned argument for the big’. The provision rather works the other way around. The classic notion of subsidiarity contains a burden of argument for centralisation on the central government. In its purest form, subsidiarity goes even further and holds that the power originally rests with the subnational unit and is delegated upwards at the discretion of the latter, and not at the discretion of the central authority. Conversely, the expression of subsidiarity in section 156(4) contains a burden of argument for decentralisation. Van Wyk points towards this difficulty when he refers to the debates towards the 1993 Constitution, where arguments, based on institutional, allocative subsidiarity were mounted to determine the relationship between national and provincial governments. The problem, he argues is that these arguments are based on a ‘top-down’ approach or a ‘shifting’ of powers, implying that all powers vest in the centre (Van Wyk 1998, 259). Despite this, both the 1993 and the 1996 Constitution clearly proceed from that assumption.

The difference in approach between section 156(4) and classic notions of subsidiarity is evident from the application of the efficiency test. Both the European and the South African ‘variety’ of the allocative subsidiarity idea contain an efficiency test. However, the similarity is more apparent than real. The European efficiency relates to efficiency gains that may be had by centralisation while the South African efficiency

relates to gains that may be had by decentralisation. In terms of article 5 of the EC Treaty powers go up only if and so far as they can be more efficiently exercised at decentralised level. Section 156(4) of the Constitution provides that powers go down if the objectives can be better achieved at decentralised level. An important driver for the approach in the EC treaty is the notion that the smaller unit should reap the benefit of error; if a function is misallocated, let it be misallocated to the smaller unit rather than to the larger body (Barber 2005, 313). This premise is borrowed from the notion that state sovereignty resides in the people as a corporate body constituted by cities and provinces. It is difficult to locate a similar argument within the South African Constitution.

These observations do not detract from the fact that the overall objective remains the same, namely to recognise a preference for local government when it comes to the allocation of powers. In sum, it may be appropriate to view the subsidiarity principle for local government as a 'preference for the small', rather than an 'automatic bias towards the small'. This is also in line with the manner in which relevant international instruments such as the European Charter and the Aberdeen Agenda formulate the principle in its application to local government.

10.4 Residual powers

The location of residual powers can be seen as a function of whether or not the principle of subsidiarity has been embraced or not (Van Wyk 1998, 256). For example, the location of residual powers with the Länder in Germany (see above) is an expression of subsidiarity. Van Wyk argues that the location of residual powers with the national government does not mean that only Parliament may exercise those powers; nothing prohibits Parliament from assigning anyone of those residual powers to other spheres of government. However, whether or not a residual power is assigned to another sphere of government is really a 'top-down matter', decided within the discretion of the national government. Importantly, decision making in this regard is not subject to section 156(4) of the Constitution. It is therefore, argued that the fact that the Constitution allocates residual powers to the Parliament points towards a modest embrace of the subsidiarity principle.

10.5 Whose principle is it to apply?

The question as to who applies the subsidiarity principle as set forth in section 156(4) relates to the issue of judicial enforceability. The overview of comparative and international examples shows that judicial enforceability has certainly not been the defining feature of subsidiarity; its symbolic and political importance far outweighs its legal importance in the jurisdictions and instruments reviewed. It is suggested that the same may apply to section 156(4) of the Constitution. A number of reasons may be advanced. Firstly, the fact that the rationale for subsidiarity lies in the realm of assessing effectiveness of governance renders the principle less open to judicial interpretation (Van Wyk 1998, 257). The courts may be reluctant to be drawn into debates on the technical merits of locating a function at municipal level. This is as these are likely to centre on issues such as the efficiencies generated by municipal performance of the function, intergovernmental fiscal ramifications of the transfer, economic imperatives such as spill-over effects and intergovernmental efficacy, capacity assessments of municipalities etc. Secondly, courts will, before hearing a dispute on the location of functions, insist on the exhaustion of intergovernmental remedies, as instructed by section 41(3) and (4) of the Constitution. Thirdly, section 156(4) requires assignment “by agreement”; the impact of this on judicial enforceability is unclear. It is common for a court to order parties to return to the negotiating table and work towards a settlement. However, it is not possible for a court to determine and impose upon the parties the content of an agreement. Judicial enforceability of section 156(4) suggests that, after a court order to ‘assign’, it is left up to the parties to formulate an agreement. Fourthly, whose obligation is it to assign Schedule 4A matters? Schedule 4 matters are concurrent national and provincial matters. Both national and provincial executives thus have the authority to assign a Schedule 4A matter to a municipality within their jurisdiction. Arguably, a municipal claim for assignment can be exercised against both but which one of the two must be compelled to do so under the operation of section 156(4)? For example, can a provincial government, when confronted with a legal challenge on the basis of section 156(4), escape liability by arguing that national government must assign, and *vice versa*? Fifthly, it is suggested that a calculated, programmatic approach to devolution that is managed through intergovernmental relations fits in better with the functionality-emphasis in the South African principle of subsidiarity. It fits in better

than a ‘rights based’ approach that delivers the full spectrum of decision making on the division of powers to the courts. In a rights-based approach, the spectre arises of, what can be termed ‘slapstick asymmetry’ whereby the invocation of section 156(4) of the Constitution by individual municipalities results in functions and powers ‘tumbling up and down’ mitigated by nothing but a court that has the unenviable task of mediating the endless intricacies of governance. A rights-based approach to devolution does not accord with the emphasis in the Constitution on cooperative government. Courts have on occasion resorted to the principle to ward off overly litigious organs of state.¹² The Constitutional Court has made it clear, in the context of national/provincial relations, that cooperative government, rather than “competitive federalism” is the guiding principle.¹³ A competition for competencies, refereed by the courts does not accord with this trend in jurisprudence.

It was argued above that a functionality-based approach to subsidiarity is more amenable to take into account external factors. It is suggested that one such external factors is particularly important. Firstly, the indisputable reality of a grossly uneven distribution of skills among municipalities should play a role in the application of section 156(4) of the Constitution. Decentralisation inevitably results in competition for skills; indeed healthy competition is one of the virtues of decentralisation. However, it needs little argument that the distribution of skills among municipalities is inequitable to such an extraordinary degree that competition becomes a curse rather than a virtue. The unmitigated application of subsidiarity on a rights-based footing may result in these inequities being compounded rather than addressed. The capacity condition in section 156(4) does not suffice in mediating this risk. In an unmitigated, rights-based operation of section 156(4), the presence of an abundance of skill in a municipality may assist in attracting new functions to the municipality, especially since the capacity condition in section 156(4) is less problematic. These functions, in turn, attract funds and enhance the skills requirements of the municipality. The result

¹² See *Uthekela District Municipality and Others v President of the Republic of South Africa and Others* 2002 (11) BCLR 1220 (CC) at para 19; *Premier of the Western Cape Province v George Municipality*, unreported decision Cape High Court, case no 8030/2003. See also *Ngqushwa Local Municipality v MEC for Housing, Local Government and Traditional Affairs* [2005] JOL 14776 (CK); *National Gambling Board v Premier of KwaZulu-Natal and Others* 2002 (2) BCLR 156 (CC) at para 41.

¹³ *In Re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) para 287.

of an ‘un-managed’ application of section 156(4) may very well be a compounding of the inequitable distribution of skills. Again, a programmatic approach to devolution, mediated through intergovernmental relations would be better placed to confront these challenges.

11 INTERPRETING SECTION 156(4) OF THE CONSTITUTION

It was suggested above that section 156(4) in and of itself cannot be a cause for legal action. This does not mean, however, that the principle of subsidiarity plays no role in lawmaking, governance or judicial adjudication of competency disputes.

11.1 Lawmaking and governance

11.1.1 Constitution making

As contended earlier, the broader principle of subsidiarity has found its way into various provisions of the Constitution. It has thus already played a role, albeit a modest one, in the drafting of the Constitution. It is suggested that future amendments to the Constitution should be made with recognition to the fact that the Constitution has established a governance system that acknowledges subsidiarity. This applies in particular to changes to the division of powers and functions.

11.1.2 Application of the assignment and delegations framework

National and provincial governments have the authority to assign matters to local government in addition to the ‘original’ powers local government already has on the basis of section 156(1) and Schedules 4B and 5B.

The Constitution contains a legal framework for the assignment of legislative and/or executive powers to local government. Sections 44(1)(a)(iii) and 104(1)(c) provide for the assignment of legislative powers by Parliament and provincial legislatures. Sections 99 and 126 provide for the assignment of executive powers by national and provincial cabinet members. An assignment can be directed at local government or at (groups) of municipalities. Section 9, 10 and 10A of the Municipal Systems Act 32 of

2000 provide for substantive and procedural criteria that must be followed when powers are assigned to local government. The principle of allocative subsidiarity as set forth in section 156(4) of the Constitution should play a role in the application of this framework. It is not a separate legal basis for assignment. It refers to the assignment, by agreement, of the administration of a Schedule 4A or 5A matter to a specific municipality. All of these ingredients point towards the assignments that have their basis in the abovementioned provisions on of the Constitution that deal with assignment. It is therefore submitted that section 156(4) is not an additional procedure or basis for assignment, but is rather a principle that sets out the circumstances under which assignment becomes compulsory.

11.2 Adjudicative role

11.2.1 Interpretation of competencies

Even if section 156(4) in itself cannot be a self-standing ground for legal action, its underlying principle should play a role in the adjudication of disputes over competencies if they reach the courts. Van Wyk argues that the Constitution leaves room for “a competency bias in favour of the smaller sphere”, especially where there is uncertainty about the interpretation of the scope of competencies (1998, 268).

Thusfar, the Constitutional Court appears to have adopted an approach to the interpretation of competencies that is functional. For example, in *DVB Behusing* the Court, when dealing the division of powers and functions between the national and provincial legislatures, remarked that-

“[i]n the interpretation of those schedules there is no presumption in favour of either the national legislature or the provincial legislatures. The functional areas must be purposively interpreted in a manner which will enable the national parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively”.¹⁴

¹⁴ *DVB Behusing (Pty) Limited V North West Provincial government and another* 2000 (4) BCLR 347 (CC) at para 17.

This decision was delivered in the context of a dispute over provincial powers. It makes it clear that there is little room for a presumption or an automatic bias in favour of the provincial sphere. Does the same apply to local government? The question is then whether subsidiarity applies equally with respect to provincial and local government and whether it can thus be assumed that the same, strictly functional approach will be adopted with regard to local government. Or does subsidiarity contain more added interpretational value with respect to local powers than it does with respect to provincial powers?

It is suggested that it does. Subsidiarity has found less explicit recognition with respect to provincial government if it is compared with local government. The Constitution entrenches participative subsidiarity with regard to provincial government (through the National Council of Provinces) but does not contain the same strongly worded expressions of protective and allocative subsidiarity with respect to provincial government.

It is thus submitted that the principle of institutional subsidiarity and particularly its functional rationale, embedded in the developmental objects of local government may play a role in the interpretation of competencies by the courts. As it is the general principle of institutional subsidiarity that plays a role, it is not limited to Schedule 4 and 5 but could even extend to residual matters.

11.2.2 Compliance with intergovernmental consultation around assignment

A third area where the principle of subsidiarity may be applied by the courts is the compliance with intergovernmental consultation around assignment and delegation. The procedural requirements for assignment referred to earlier are designed to ensure effective assignments and to avoid the transfer of functions without resources and capacity for local government to execute those functions. The courts may be called upon, after intergovernmental dispute settlement has failed, to judge whether the Constitution and the Municipal Systems Act have been adhered to in the transfer of functions to local government or to a municipality. In assessing such claims, courts may be influenced by the principle of subsidiarity, particularly the protective and participative aspects contained therein.

CONCLUSION

This paper attempted to clarify the role played by section 156(4) of the Constitution by tracing some of the origins and manifestations of the principle of subsidiarity, on which this provision is modelled. It was argued that, albeit modelled on it, section 156(4) is distinctly different from the classic manifestation of subsidiarity, which would have established a principled and automatic bias for local government that only gives way to a reasoned argument in favour of other spheres of government. Section 156(4) works the other way around. It establishes a preference, not an automatic bias for local government. This preference must be substantiated with an argument that the assignment of the power to local government is functional in that it enables government to achieve the developmental objects of local government. It was further argued that section 156(4) of the Constitution cannot be a self standing ground for legal action but plays a guiding role in lawmaking, governance and the interpretation of competencies.

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