

Department of Justice and Constitutional Development
ATT: Mr J J Labuschagne

Cape Town, 17 July 2009

Dear Mr. Labuschagne,

RE: SUBMISSION 17TH CONSTITUTIONAL AMENDMENT BILL

The Local Government Project of the Community Law Centre (University of the Western Cape) hereby thanks the Department of Justice and Constitutional Development for the opportunity to comment on the Draft 17th Constitutional Amendment Bill.

In this submission, the Centre wishes to record its concerns regarding the proposed Bill. The first set of concerns relate to the rationale for the amendment, namely the electricity restructuring. The second set of concerns relate to concerns around the general legal and constitutional consequences of the amendment.

Introduction

Section 156(1) of the Constitution is the basis for the status of local government in the Constitution. It provides that municipalities have authority over the matters listed in Schedules 4B and 5B of the Constitution. Schedules 4B and 5B, in turn, each contain a list of topics, called 'functional areas'. This constitutional protection of local government's authority sets South Africa apart from most other countries in the world. Usually, local government is not referred to in a Constitution. Where a Constitution does mention local government, it usually does not provide and protect specific areas of authority like the South African Constitution does.

One of these protected functional areas is "Electricity and gas reticulation" which means the distribution of electricity to end-users. Therefore, the Constitution gives municipalities the authority to 'reticulate' (distribute) electricity.



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Electricity redistribution

On the basis of this constitutional authority, municipalities purchase electricity (mainly from ESKOM) and distribute it to end-users. For the last ten years, national government has been planning to restructure the electricity industry. Municipalities are to surrender their authority to sell electricity as well as the assets that are used for it, to six Regional Electricity Distributors (REDs). Initially, municipalities were requested to do so voluntarily. Many municipalities did not cooperate with the voluntary scheme. Another complicating factor has been that municipalities cannot easily transfer functions or assets to outside entities. There are strict rules to be followed in the Municipal Finance Management Act.

CONCERNS REGARDING THE ELECTRICITY REDISTRIBUTION

Introduction

The national government's arguments in favour of the restructuring relate mainly to the fragmentation of electricity tariffs (municipalities determine their own electricity tariffs, within margins set by the National Energy Regulator of South Africa) and to the lack of investment in electricity infrastructure. It is argued by the national government and reiterated in the Explanatory Memorandum that economies of scale are necessary to improve the electricity distribution industry.

Departing from the intention of the Constitution

Essentially, the 17th Amendment Bill is about the transfer of municipal authority and municipal assets into regional entities if and when "regional efficiencies and economies of scale" will be achieved with such a transfer. It is suggested that, by introducing this criterion, the amendment represents a radical departure from the commitment to 'developmental local government'. This commitment, expressed in section 152 of the Constitution and in the White Paper on Local Government envisages municipalities that are charged with a service delivery and developmental mandate on the basis of the notion that they work hand in hand with communities. The Constitution thus places great premium on the empowerment of communities, a responsive local state and the subsidiarity principle, i.e. that government should be brought as close as possible to communities.

This amendment reduces the question about the value of local government to an economic one, i.e. "efficiencies and economies of scale". It breaks with the constitutional commitment to the empowerment of communities and the constitutional commitment to bring government close to the people. While efficiencies and economies of scale are important in any government's books, they must sometimes defer to the bigger objective of achieving a more inclusive and responsive democracy. The transfer of critical service delivery and development functions to anonymous parastatals is critically at odds with this constitutional commitment.

Economies of scale

It is our submission that the rationale for the 17th Amendment Bill is flawed as it appears to be based on the assumption that the existing institutional and legal framework for local government offers no solution to a quest for economies of scale in the distribution of electricity.

This is incorrect as the institutional and legal framework for local government contains many unexplored avenues for regionalisation of municipal services.

Firstly, the institution of local government itself is able to operate at a regional scale. Local municipalities have been traditionally responsible for electricity reticulation. However, district municipalities exist and are explicitly justified by the need to obtain economies of scale in municipal services, where those economies of scale are needed. Yet, no mention is ever made or argument presented that the economies of scale that are sought by the electricity redistribution drive may be attainable at the level of the existing district municipalities. National government has the executive authority to adjust the division of powers and functions among district and local municipalities and the criteria for doing so are determined in ordinary legislation. Therein lies an unexplored avenue for achieving economies of scale. However, instead of examining this avenue, government pursues the establishment of another layer of government with the consequent loss of accountability.

Secondly, municipalities can achieve economies of scale by establishing multi-jurisdictional service utilities in terms of Chapter 8, Part 4 of the Municipal Systems Act.

Boundaries

The envisaged boundaries of the six REDs do not follow municipal boundaries, i.e. there will be many municipalities that resort under more than one RED.

Electricity services are inextricably linked with the built environment and infrastructure services provided by municipalities. Municipalities are instructed by law to produce Integrated Development Plans (IDPs) that present an “all of government” approach to the municipal area, i.e. the plans and strategies of all government and development actors should be reflected in this IDP. By creating a separate level of public service delivery with boundaries that are foreign to the boundaries of municipalities, the REDs configuration will be responsible for further aggravation of the already distressed system of intergovernmental planning. Moreover, the practical realisation of the handover of electricity assets by municipalities and distribution of electricity revenues to municipalities will be unduly complex if not near-impossible as a result of the boundary mismatch.

Fragmentation of tariffs

The argument that the fragmentation of tariffs among municipalities necessitates regionalisation of the electricity industry is misplaced as it ignores the fact that national government has sufficient regulatory leverage over local government to address fragmentation of tariffs. National government has the authority, in terms of section 155(7) of the Constitution to regulate electricity tariffs and determine margins within which municipalities determine electricity tariffs. No constitutional amendment is necessary for national government to be able to regulate electricity tariffs.

Moreover, the argument lacks rationality. Water tariffs, another basic commodity that is essential both an individual’s dignity and economic activity, are far more fragmented across municipalities than electricity tariffs. Yet this has not prompted national government to remove water distribution from municipalities.

Financial viability

There is no evidence that the envisaged Regional Electricity Distributors will be financially viable. There is only the view that the collapsing of a number of weak and unviable municipal electricity distribution units into one regional unit will produce a viable regional entity. The persistent problem of financially unviable municipalities, even in the aftermath of the amalgamation of municipalities in 2000 should have been sufficient evidence to the contrary.

It is particularly troubling, in this respect, that there appears to be no intention to include ESKOM's distribution to large industries into the REDs. If municipalities were to be made entitled and capacitated to sell electricity to large industries, as the Constitution permits them to do in section 156(1)(a) read with Schedule 4B, the viability of municipalities and the municipal electricity distribution industry would receive a major boost.

In any event, the above means that, in the plans towards the electricity redistribution, continued government subsidisation of the REDs will be inevitable. This critically undermines the business case for the removal of the function from local government.

Lack of investment

The argument that municipalities are not investing sufficiently in electricity infrastructure is a self-fulfilling prophecy and therefore a false argument. For a decade, the municipal sector has been subjected to uncertainty about the future of the electricity function. During that period, municipalities have never been able to say with certainty that they would retain the electricity function and the assets associated with it. It goes without saying that investment and maintenance decisions have been influenced by this: why invest in infrastructure if national government is committed to forcibly remove this from you? It is suggested that the prolonged uncertainty in the sector has slowed down investments more than the perceived unwillingness to invest on the part of municipalities. Certainty in the municipal electricity distribution sector that the function remains with local government, coupled with assistance for local government from national government will produce a more viable electricity distribution sector than the establishment of another layer of parastatals.

In any event, the existing constitutional framework provides sufficient regulatory leverage for national government to address the concern of maintenance and investment. For example, national government may use its regulatory power in terms of section 155(7) of the Constitution to enact legislation that forces municipalities to direct resources to maintenance of infrastructure and investment into infrastructure.

Debt collection

Municipalities, unlike national government, may not budget for a deficit. It receives limited funding from national government and must balance its budget by recovering the costs for services it provides and levying property rates on resident home-owners. Collecting service fees and taxes is vital to the financial viability of any municipality. Payment for services and rates is thus the Achilles Heel of any local government: a municipality that does not collect service fees and taxes very quickly slides into financial disarray and receives very little sympathy from national or provincial government. These principles are central to the local government system and embedded in the Constitution and the Municipal Finance Management Act 56 of 2003.

At the same time, municipalities must balance this cost recovery instruction with its developmental mandate and its role in protecting and uplifting the poor. The ability on the part of municipalities to, as an ultimate resort, disconnect electricity services to defaulters who are able to pay is absolutely essential for municipalities to strike this difficult balance.

Regional Electricity Distributors will never be able to use this instrument in an equitable manner because there is no connection between REDs and communities. Communities will feel as close to their 'RED' as they currently feel to other parastatals such as Transnet and Spoornet. The municipality is a local democracy, characterised by an elaborate web of accountability and participatory mechanisms that communities and residents use to engage with their municipality. The fact that these mechanisms are failing in too many municipalities requires urgent attention but is no wildcard for placing a critical developmental function with anonymous parastatals.

It is uncertain how municipalities will be compensated for the loss of this critical risk-management device. It may very well be that municipalities will resort to the termination of water services as this is the other last resort leverage that municipalities have over persistent defaulters. Disconnection of water services is permitted by the Water Service Act, albeit under very strict circumstances. However, it is suggested that disconnection of water services is fundamentally problematic as it strikes the individual's right to dignity and constitutional right of access to water. The amendment may thus result in the aggravation of already tense relationships between many poor communities and their municipality. It may also result in the infliction of further social misery upon communities that are already cornered in abysmal circumstances.

CONCERNS REGARDING THE CONSTITUTIONAL STATE AND THE CONSTITUTIONAL DIVISION OF POWERS

A Constitution that is no longer supreme

Clause 156(1A)(a) opens with the phrase: "Notwithstanding any other provision of the Constitution". What can the first few words – "notwithstanding any other provision of the Constitution" – refer to? The only answer is that it refers to other provisions of the Constitution which may be applicable to the envisaged Bill on the Electricity Redistribution. The Bill is thus an attempt to insulate the forthcoming Bill from scrutiny in terms of other sections of the Constitution. This defeats the entire purpose of having a constitution as the foundation of all law if certain types of laws can be excluded from constitutional scrutiny. This is also in violation of one of the founding values of the Constitution, provided for in section 1(c) of the Constitution, namely "Supremacy of the Constitution and the rule of law".

The Constitution cannot say that it is no longer supreme, without having to remove this foundational value. Regardless of the special majority needed to amend a constitutional value (s 74(1) Constitution), this proposition cannot even be contemplated let alone considered as it goes to the heart of our constitutional state.

Disrupting the constitutional division of powers

An examination of the regulatory powers, which the amendment seeks to allocate to national government, reveals misunderstandings as to the constitutional division of powers.

Confusing duplication of regulatory powers

Firstly, the Bill exposes a fundamental 'under-appreciation' of the existing regulatory leverage of national government. Clause 156(1A)(b)(iii) indicates a concern around the equity of tariffs, user charges, fees and service levels and allocates a regulatory power to national government to deal with this concern. Clause 156(1A)(b) (iv), (v) and (vi) indicate a concern around equitable access, universal coverage, minimum standards and unreasonable action by municipalities.

These provisions are, to a large extent, unnecessary as national government already has such regulatory authority with respect to Schedule 4B matters, which include electricity reticulation. They amount to a confusing duplication of national government's regulatory authority in terms of section 155(7) of the Constitution, which permits national government to see to the effective performance by municipalities of Schedule 4B functions "by regulating the exercise by municipalities of their executive authority referred to in section 156(1)". There is nothing in the Constitution that prevents national government from regulating the equity of tariffs, user charges, fees and service levels in local government when it comes to Schedule 4B matters. It may do so in terms of section 155(7) of the Constitution. The only constraint is that it may not regulate in a manner that reduces municipal discretion to naught or compromises municipal functioning (s 151(4) Constitution). In fact, such regulatory activity, i.e. the setting of minimum

standards and tariff margins are part of a central government's essential oversight role over decentralised entities.

The Bill ignores the fact that provincial governments have the authority to regulate minimum standards that ensure equitable access, universal coverage, acceptable service levels etc. with regard to Schedule 5B matters. The Bill seeks to overlay this provincial authority with a similar national authority when economies of scale are to be attained. It is suggested that the amendment signals a lack of confidence in provincial government's ability to discharge this regulatory function rather than a concern with local government's performance.

Confusing duplication of oversight powers

The same applies to the constitutional instruments for executive oversight that are ignored by the Constitution. The Bill seeks national authority to adopt legislation to "prevent unreasonable actions by a municipality which is [sic] prejudicial to the interests of another municipality or to the country as a whole". In terms of the Constitution, provincial governments already have the authority to prevent such unreasonable actions by a municipality in terms of section 139 of the Constitution. The phraseology of section 156(1A)(b)(vi) copies the text of section 139(1)(b)(iii). Again, the provision amounts to a confusing duplication of already existing systems of intergovernmental oversight and appears to be based on a lack of trust in provincial ability to oversee municipalities.

Reducing provincial power

In addition to being overtly based on a lack of trust in provincial capacity, the amendment re-arranges the constitutional division of power between provincial governments and national government. Before this point is explained, the importance of the careful balance between provincial and national authority must be emphasised. There is no argument that the greatest challenge for the drafters of both the 1993 and the 1996 Constitution was the division of authority between provinces and national government. This theme, and not the Bill of Rights, continued to drive a wedge between various political parties, liberation movements and other stakeholders that took part in the drafting of the Constitution. The current configuration, encapsulated in the constitutional provisions, thus represents an outcome that was indispensable in carrying South Africa across into a democratic, constitutional dispensation. The 17th Amendment Bill changes this configuration. It thereby rejects the most essential outcome of constitutional negotiations.

Essential to the carefully crafted constitutional division of authority between national government and provincial governments is that certain matters are exclusive to provinces. These are the matters listed in Schedule 5. They are out of bounds for national government, except when necessary to achieve any or more of the objectives detailed in section 44(2) of the Constitution.

The Bill brings a part of Schedule 5 under national authority when there are concerns around the economies of scale. This drastically reduces provincial authority over Schedule 5.

If the first phrase in clause 156(1A)(a) is retained and the supremacy of the Constitution is sacrificed, the result will be that section 44(2) of the Constitution is swept aside in the context of a pursuit of regional efficiencies on Schedule 5B matters. Considering the centrality of section 44(2) to the tender balance between provincial and national authority and the ongoing discussion surrounding the role of provinces it can at least be argued that this amendment jumps the gun.

If the first phrase in clause 156(1A)(a) is not retained, an impossible inconsistency is created. It will then be unclear as to which test applies to whether or not national government can legislate on Schedule 5B matters: section 44(2) or section 156(1A)? Both sections seek to circumscribe, using different criteria, when national government may regulate Schedule 5B matters.

Unnecessary width of the regulatory powers

Assuming that the Bill is aimed at paving the way of the involuntary introduction of REDs, the Bill is unnecessarily wide in its scope. It does not just subject the electricity function to more intrusive regulatory national authority. Instead it places the entire scope of local government's constitutional authority under this more intrusive regulatory authority. No rational explanation is offered for this. The explanation offered by the Memorandum of Understanding is that the Bill seeks "to allow the national government to further regulate the executive authority of local government in certain circumstances. Those circumstances would include, for example, where a municipal function can be provided to communities more effectively, efficiently and sustainably on a regional basis than on a local basis".

Again, the Bill disregards the institutional structures and arrangements that exist to achieve regional efficiencies. If a function is performed at the level of a local municipality, economies of scale are achievable at a district level or through the collaboration between municipalities in multi-jurisdictional service delivery utilities. It is clear that the Bill seeks to amend the Constitution for possible administrative convenience in the future rather than on the basis of a principle or profound policy imperative.

Unsatisfactory safeguards

The safeguards, contained in the Bill are unsatisfactory and confusing. Firstly, any national law based on the envisaged section 156(1A)(a) must facilitate appropriate municipal participation in decision-making (Clause 156(1A)(c)(i)). It is not clear what is meant with "decision making". Does it refer to the legislative decisions, envisaged in clause 156(1A)(b) or to the executive and administrative decisions that may flow from such legislation? If the first interpretation is correct, the Constitution already provides for the participation of organised local government (s 154(2) Constitution) and "municipal participation" must be read to call for another type of participation, such as the participation of individual municipalities. If the second interpretation is correct the term "participation", which is assumed to refer to more than the consultation that is in any event required under section 41(1)(h) of the Constitution, is unclear. How, for example, does a municipality "participate" in the "compulsory participation" in institutional arrangements? Similarly, how does a municipality "participate" in national executive or administrative decisions, aimed at preventing it from performing unreasonable actions?

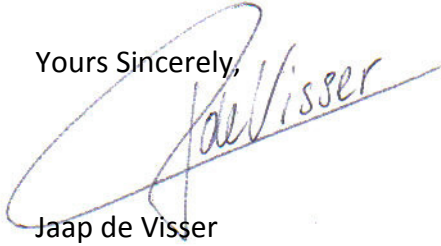
It is very difficult to escape the conclusion that the call for "municipal participation" is designed to somehow present a radical, irreversible reduction in authority in a slightly more palatable, yet meaningless manner.

The other safeguard is that the legislation "must maintain municipal accountability to its [sic] community in respect of the function concerned". It is not clear what the meaning is of this provision. Accountability, i.e. the requirement to account for one's conduct, is the flipside of authority. Organs of state are held accountable to the extent that they have authority. The amendment wants the envisaged legislation to remove authority surrounding municipal functions from the municipality yet ensure that communities continue to hold it accountable for the performance of that function. It does not require a cynic to identify a scheme whereby the parastatal receives the better deal. It can make unpopular decisions to improve its balance sheet while the municipality is at the receiving end of the community's wrath without having exercised any authority on the matter.

Thirdly, the legislation must maintain fiscal and institutional sustainability through protecting municipal own revenue. While this appears to be designed to ensure that municipalities are guaranteed of some form of income from a trading function, if and when it is removed, it does little to allay fears of an erosion of municipal financial viability. It is suggested, for example, that the removal of electricity disconnection as an instrument of debt collection and the maintenance of fiscal sustainability of municipalities is irreconcilable.

We trust that you will take our comments into consideration and once again thank you for this opportunity.

Yours Sincerely,



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