CHAPTER 1

INTRODUCTION

With the introduction of the 1996 Constitution,[1] local government was for the first time in South African history acknowledged as a fully fledged 'sphere' of government and its role and responsibilities as an equal partner of national and provincial government gained momentum. Local government no longer was an instrument at the hands of national government, used to implement its apartheid policies and practices.[2] Instead, it became one of the three "distinctive, interdependent and interrelated spheres"[3] of government and a new unexplored legal space for local government opened up.

But on 18 March 1998, a crack in the newly created sphere of local government appeared. The Eastern Cape Provincial Executive intervened in the Butterworth Transitional Local Council and assumed full responsibility for the administration of Butterworth. The province used as a legal basis section 139 of the very same Constitution that provided Butterworth with this new status as being part of an 'independent and autonomous sphere of government'.

This immediately raised numerous questions about section 139. What does this intervention mean? When, under which circumstances, can a province exercise this power? What does it mean when a province assumes responsibility? What powers does it have? How far can it go and what are the roles of the Minister and the National Council of Provinces?

Very soon, it became clear that the legislation, envisaged by section 139(3), aimed at regulating the process of the intervention is absolutely necessary in order to prevent section 139 from becoming either a scene of 'wild west interventions' or a 'paper tiger'.

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[1] Act 108 of 1996.
[2] See N Ismail and C J J Mphaisha, 'The Final Constitution of South Africa: Local Government Provisions and their Implications', *Occasional Papers, Konrad Adenauer Stiftung* (1997) at pg. 3-9.

This paper aims to be an introduction to some of the legal issues and uncertainties, plaguing section 139. Chapter two deals with the *substantive* requirements for intervention: in other words, what circumstances, prevailing in a municipality, merit a section 139 intervention? In chapter three, the *procedural requirements* for intervention are discussed, subdivided in the procedures before, and after the intervention. Chapter four defines the powers of the province and the Municipal Council after a section 139(1)(b) intervention and chapter five presents a case-study on the intervention in Butterworth. Finally, chapter six compares section 139 with similar legislation in the Netherlands. Although, in principle, section 139 seems to enable the province to exercise an infinite variety of interventions,[4] the main focus of this paper will be the intervention, whereby the province assumes responsibility in terms of section 139(1)(b).

It would strain common sense to think that, at this point in time, all the legal questions, surrounding section 139 can be answered. But an attempt will be made to gather different opinions and possibilities and present answers to the questions that arise in the context of section 139. This will be done, bearing in mind that a balance has to be struck between the constitutional protection of the autonomous sphere of local government and the need for good and effective government at local level.

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[3] Section 40(1) of the Constitution.
[4] See paragraph 2.8.

CHAPTER 2

WHEN TO INTERVENE?

In this chapter, the *substantial* requirements for a section 139 intervention will be discussed. In other words, under what circumstances can a province intervene in a failing municipality? The situation where an intervention is appropriate is described in section 139(1) as:

> "When a municipality cannot or does not fulfil an executive obligation in terms of legislation..."

2.1 "...a municipality..."

Section 139(1) speaks of "a municipality". What is meant by 'municipality'? *Who* has to fail in executing the obligation? Does the fact that a municipality has incapable municipal workers mean that the 'municipality' is incapable? Does section 139, by using the word 'municipality', refer to the 'top-management' of the municipality, namely the Municipal Council, which means that if they fail, the province can intervene? What about the Chief Executive Officer? Can a province intervene in a municipality where the Chief Executive Officer fails to perform, but the Municipal Council performs satisfactory?

Section 151(2) places the executive and legislative authority in the Municipal Council. It follows that the Municipal Council is the highest authority in the municipality. The term 'municipality' should be seen as a holistic term, embracing the entire municipality with all its organs, workers and offices. The Municipal Council, however, is the organ with the highest authority and, as a result, with the highest responsibility. Therefore, the Municipal Council is accountable to the province in the context of section 139. If the Chief Executive Officer fails to perform and as a result of that, the municipality fails to fulfil its obligations, the Municipal Council is accountable to the province in the context of section 139. The province can then

intervene in terms of that section and take over the role *of the Council*, if and to the extent necessary.[5]

2.2 "...cannot or does not..."

The term 'cannot' refers to a situation of incompetence or inability. The municipality is not capable of performing its functions. The intention of a municipality is irrelevant. Even if the municipality tries to do the best it can within its competence, a failure to meet the standard of 'fulfilling an executive obligation' will be decisive. However, not each and every incapability forms a reason for intervention. There are two exceptions:

a) There are circumstances where a Council does not have a choice, other than to cease performing its functions. An example is a labour conflict, where a legitimate strike of municipal workers results in the suspension of the delivery of services.
b) Extreme emergencies can occur. When a *vis mayor*, eg natural disaster causes failure on the part of the municipality to perform its normal functions, section 139 is not the appropriate way to intervene. There is no indication in the text or elsewhere that section 139 is meant to be an 'emergency power', which gives the province the right to intervene in a municipality in case of emergencies.

The term 'does not' seems to refer to a situation where a municipality is capable of performing its functions, but, for some reason, does not do so. It is hard to think of situations other than where there is 'unwillingness' on behalf of the Municipal Council.[6]

2.3 "...fulfil an executive obligation in terms of legislation..."

The Constitution speaks of an *executive* obligation. The dictionary meaning of the word *executive* is "administrative: distinguished from legislative and judicial".[7] When

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[5] To take that argument further: if the Council and the CEO perform well, but the administration or the municipal workers are the reason for the municipality failing to do its job, the Municipal Council is still the responsible organ.

[6] Here, one can find an indication that section 139 is 'addressed' to the Municipal Council. Where a CEO or a high official is 'unwilling', the duty is on Municipal Council to exercise its authority and there is no reason (yet) for the province to intervene. But if the Municipal Council is 'unwilling', then there clearly is scope for a 139 intervention.

[7] According to *Webster's New World Dictionary*, Third College edition, New York (1988). The *Shorter Oxford English Dictionary*, Oxford (1973) says: 'pertaining to execution: having the function

read together with section 151(2) of the Constitution, it appears that section 139 is not concerned with the municipality's *legislative* authority, namely its authority to make by-laws.[8]

An intervention in the case of failure to fulfil an obligation presupposes a *pre-existing* legal obligation. When read together with the phrase "in terms of legislation", it follows that it should be possible to trace the obligation back to a statute.[9] The Provincial Executive must indicate *which* statutory obligation is at hand. An important question in this regard is how narrowly described this executive obligation must be. Can the Provincial Executive intervene with reference to the objectives of local government, as laid down in the Constitution?[10] Or should there be a reference to a specific statutory obligation, in which the municipality is assigned a particular task? The latter seems to be the intention behind section 139. The objectives of local government, as laid down in the Constitution, are too broad and too vague. Section 152 stipulates that a municipality must strive, *within its financial and administrative capacity*, to achieve objects such as to ensure the provision of services to communities in a sustainable manner, the promotion of social and economic development and the promotion of a safe and healthy environment. It would be very difficult to measure a municipality's achievements in terms of these objectives. Indeed, it can be argued that there are few municipalities in South Africa that meet these requirements fully. Using the constitutional objectives of local government as yardstick in the context of section 139 renders the scope of section 139 too broad and opens the door for abuse.

Therefore, the intervening Provincial Executive should indicate with some precision which executive obligations were not fulfilled by referring to existing statutory law.

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of executing: esp. as concerned with carrying out the laws, decrees and judicial sentences: opp. to 'judicial' and 'legislative'.

[8] In paragraph 4.1, the distinction between 'executive' and 'legislative' powers is discussed in the context of the permissible extent of the intervention.

[9] See again the dictionary meaning in the 'Shorter English Dictionary' *supra* n3: "having the function of executing: esp. as concerned with *carrying out the laws, decrees and judicial sentences* (emph. added).

[10] The objectives of local government are entrenched in sections 152 and 153 of the Constitution.

2.4 Not all executive obligations can be assumed responsibility for

The second part of section 139(1)(b) circumscribes the substantial requirements further but only with regard to the assumption of responsibility.

> "assuming responsibility for the relevant obligation in that municipality to the extent necessary-
>
> (i) to maintain essential national standards or meet established minimum standards for the rendering of a service;
>
> (ii) to prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or
>
> (iii) to maintain economic unity."

When read together with the first part of section 139, which deals with the non fulfilment of the 'relevant' obligation that is being referred to here, this part of section 139 seems to limit the scope for assumption of responsibility to those executive obligations that are relevant to these three issues. In other words, assumption of responsibility is possible, only when the nonfulfilment of the executive obligation endangers essential national standards, minimum standards for service delivery or economic unity, or when the nonfulfilment of the executive obligation is prejudicial to another municipality or to the province. The terminology is amorphous. However, the same conditions also feature in section 44(2), although tailored to the context of legislative intervention by Parliament in Schedule 5 matters. The interpretation by the courts of section 44(2) will be relevant here, to the extent that the difference in nature of the intervention permits. In the context of section 44(2), Mettler submits that the interpretation of the necessity requirement will depend on a court's disposition towards a unitary dispensation or a federal one:

> "What may be necessary for a 'unitary' judge may be anathema to a 'federal' judge."[11]

Regarding the third condition, "to maintain economic unity", the question arises as to where this condition refers to. Can intervention be necessary for economic unity in the country as a whole or does it refer to economic unity in the province only? It is submitted that it also refers to unity in the country as a whole. The aim of unity *in the*

province is already captured in section 139(1)(b)(ii) where the municipality is prohibited from harming the interests of another municipality.

2.5 Proof of inability, incompetence or unwillingness

There must be inability or unwillingness on the part of the municipality, before an intervention in terms of section 139 can take place. How should this be proved?

There can be little doubt that a general utterance of discomfort or dissatisfaction by the residents of the municipality does not suffice. When defending the intervention, the province must point at objective factors. Examples are records of electricity or water supply, photographic material of, for instance, municipal roads, statements made (under oath) by high officials and any other evidence that can prove the existence of objective facts that made the province resort to intervention.

2.6 'Overall' state of chaos?

The question arises as to whether or not section 139 requires an "overall" state of chaos. Does failure in only one particular functional area also merit an intervention? For example, can a province intervene in a municipality where water supply is an absolute chaos, while all other municipal functions are performed well? An indication for a positive answer to that question can be found in the text of subsection 139(1)(b)(i), where the Constitution speaks about -

> "...assuming responsibility for the *relevant* obligation to meet established minimum standards for the rendering of *a* service.."[12]

It is submitted that the malfunctioning in only one particular area can merit a section 139 intervention.

2.7 Provincial support a precondition for intervention?

[11] J Mettler, 'Constitutional Powers of Local Government', unpublished paper, Community Law Centre, UWC, pg. 10.

Another important question is whether or not provincial support is a precondition for intervention. In other words, can a municipality challenge an intervention by holding that the intervening province did not 'support and strengthen' the capacity of the municipality and therefore shares guilt in the problems?[13]

The duty on the province to support and strengthen the municipality is based on the principles of co-operative government.[14] De Villiers argues that section 154(1) may balance the right of a province to "assume" powers of a local authority due to the fact that the local authority could argue in defence that the province has neglected its obligation to assist the local government in developing its capacity.[15]

On the one hand, the province clearly has the duty to support on the basis of sections 154(1), 155(6) and 41(1)(h)(ii). One can argue that it would be unfair and subversive to the idea of co-operative governance if a province would fail to fulfil that constitutional duty of providing the necessary support and subsequently assume responsibility for that municipality. The result of this would be that a province could be in the position to promote the usurping of power of a municipality by withholding the necessary support which would result in the collapse of the municipality. This is an extreme position and requires 'bad faith' on the part of the province. But then again, disputes and arguments between provinces and municipalities are not uncommon. On the other hand, it does not seem to make sense to prohibit a province from intervening, and to allow the situation in the municipality to get worse, simply because of inaction by the province in the past. This would result in an untenable situation.

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[12] Emphasis added.
[13] See 154(1) and 155(6) of the Constitution.
[14] See I M Rautenbach and E F J Malherbe, *Constitutional Law* (1996) at pg. 266 where they discuss section 154(1) as falling within the scope of co-operative government, together with the other principles such as mutual respect for constitutional status and the prohibition not to encroach on one another's geographical, functional and institutional integrity. See also R Mastenbroek and N Steytler, 'Local Government and Development: The New Constitutional Enterprise', *Law, Democracy and Development* (1997) November, at pg. 245: "The above injunction on national and provincial government to support local government needs to be read in conjunction with the principles of co-operative government as set out in chapter 3 of the Constitution."
[15] B de Villiers, 'Local-Provincial Intergovernmental Relations: A Comparative Analysis', *Occasional Papers, Konrad Adenauer Stiftung* (1997) at pg. 4.

The second argument is to be preferred. Section 139 does not seem to be the appropriate arena to play out a sanction on a failure of the province to support a municipality. To hold that, as a punishment for not providing enough support, a province forfeits its right to intervene when necessary would stifle the good administration of the country. Loss of the right to intervene should not be used as an enforcement of provisions that fall within the scope of co-operative government, which is in essence a *non-legalistic* institution.[16]

The flipside of the coin in the context of 'support and strengthen' is the duty on the municipality to foster constructive relations with the province.[17] The province must also be *enabled* by the municipality to perform its supporting role. This may include aspects such as the provision of access to relevant information, held by the municipality. The relation of support and strengthening "is not to be a one way traffic of which local government is the only beneficiary".[18] It may thus be too easy to 'punish' a province by taking away the power to intervene as a reaction to a failure in a 'support and strengthen relationship'. Moreover, it may be very difficult to apply the other approach in practice. Because is a province prevented from *ever* intervening after a lack of support? This is difficult to uphold, so the alternative means that a municipality would have to prove that there is a clear link between the lack of support and the problems in the municipality. Because the province would be prevented from intervening *to the extent of the failure that is a result of the lack of support from the province*. Especially in cases where there has been some support (but maybe not enough) this will be virtually impossible to prove.

It is therefore submitted that provincial support is not a precondition for intervention in terms of section 139.

2.8 The provincial executive's discretion

The second part of section 139(1) states:

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[16] See N Steytler, 'Decentralisation of Government and the Reform and Transformation of the Public Service in South Africa - A Constitutional Perspective', 1998 *Presidential Review Commission Report* (Anexure D) at pg. 14.
[17] See for example section 41(1)(h)(i).

> "...the relevant Provincial Executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including - ..."

The Provincial Executive has a discretion with regard to two aspects.

a) Firstly, the phrase "may intervene" indicates that the Provincial Executive has a discretion in deciding *whether to intervene or not*. It makes clear that they do not have to intervene for every single failure to fulfil some statutory obligation on the part of the municipality. They can use their discretion to decide whether or not an intervention is necessary.
b) Secondly, the Provincial Executive "may intervene by taking *any appropriate steps*,...including -". This means that there is a discretion with regard to both the *form* of the intervention and to the *extent* to which the intervention takes place.

Should this discretion be curtailed? It is an understatement to say that section 139 does not provide the provinces with sufficient guidance as to when and how they should intervene. It is also clear that the provinces need discretion. Different circumstances require different interventions. However, there is a need to objectify the substantive requirements for interventions. The requirements of 'essential national standards' and 'established minimum standards' should be given attention in legislation to the extent that it becomes possible for provinces to ascertain when the shortcomings of local government merit intervention. It would also facilitate the solution of possible disputes, following the intervention.

2.9 Summary

This chapter dealt with the substantive requirements for intervention. When can a province intervene and to what extent is it allowed to intervene? One important conclusion was that intervention is possible, only in the event of a failure to fulfil a *pre-existing and specific* statutory obligation. A failure of the province to 'support and strengthen' in terms of sections 154(1), 155(6) and 41(1)(h)(ii) cannot be the basis for the loss of the province's right to intervene. It was further argued that there

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[18] See Mastenbroek en Steytler *supra* n10 at pg. 245.

is a need to objectify the discretion of the Provincial Executive to decide when, how and to what extent intervention is necessary.

CHAPTER 3

PROCEDURAL REQUIREMENTS FOR INTERVENTION

Intervention in the form of assumption of responsibility in terms of section 139(1)(b) is the main focus of this chapter. Section 139 introduces a number of procedural requirements that can prove to be of great importance in the exercise of this instrument. One important question is whether or not there is a requirement of prior notice. This question is dealt with in Part I of this chapter. In Part II, the requirements of section 139(2), that come into play after the assumption of responsibility by the province, is discussed.

Part I
Procedural requirements before intervention

3.1 Section 139(1)(a) directive a requirement for assumption of responsibility?

In the event of a province assuming responsibility in terms of section 139(1)(b), the question arises whether the issuing of the directive ("describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations") in terms of section 139(1)(a) is a *procedural* precondition for a section 139(b) intervention.

The *text* of section 139 seems to imply that subsection 139(1)(a) is not a requirement for subsection 139(1)(b). Section 139 speaks of -

> "taking any appropriate steps...*including* -
> (a) issuing a directive...*and*
> (b) assuming responsibility..."[19]

[19] Emphasis added.

Rautenbach and Malherbe also seem to adhere to the view that subsection 139(1)(a) is not a requirement for subsection 139(1)(b).[20] The White Paper on Local Government does the same, although implicitly, by speaking of interventions -

> "...ranging from support and advice *through issuing directives* for specific actions, to the assumption of executive authority for a municipal function by another sphere of government."[21]

It seems that, on the face of it, the section 139(1)(a) directive does not form a procedural precondition for the intervention in terms of section 139(1)(b). But one could very well argue that in the event of such a severe inroad into the municipality's independence and autonomy, fairness requires the province to first issue a directive before assuming responsibility. In the context of section 100, the equivalent of section 139 in the context of the relation between national government and provinces, the Constitutional Court resolved this matter by deciding that the assumption of responsibility in terms of 100(1)(b) is not possible without first issuing the section 100(1)(a) directive.[22] The Court came to that conclusion on the basis of an interpretation of section 100 that is logical and straightforward. According to the Court, the word "and" indicates that section 100 is a *process*, whereby the first step is the issuing of the directive. The second step, after the first step appears to be unsuccessful, is the assumption of responsibility. The same approach is applicable to section 139.

3.2 Prior notice requirement?

After concluding that the section 139(1)(a) directive is a precondition for assuming responsibility in terms of section 139(1)(b), the following question arises: does the province have to send a notification, prior to embarking on either the issuing of directive

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[20] See I M Rautenbach and E F J Malherbe, *Constitutional Law* (1996) at pg. 268 where they say: "This may include a directive to fulfil the obligation, *or* the provincial government may itself assume responsibility for it to the extent that it is necessary to maintain or establish essential national standards..."(emphasis added).

[21] White Paper on Local Government, March 1998 at pg. 45.

[22] *In re Certification of Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), paragraph 124, fn 116.

or the assumption of responsibility? There are three possible avenues for arriving at the approach that 'prior notice' is a formal requirement for any section 139 intervention:

a) a requirement of 'prior notice', based on section 33 of the Constitution, which entrenches the principle of just administrative action;
b) a requirement of 'prior notice', based on common law; or
c) a requirement of 'prior notice', based on the principles of co-operative government.

3.2.1 Prior notice requirement on the basis of section 33 - ' just administrative action'?

Section 33(1) reads -

> "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."[23]

An intervention in terms of section 139 can surely be categorised as 'administrative action'. The requirement of procedural fairness in terms of section 33 would then mean that prior notification is necessary before a province can intervene. However, the question is whether or not a municipality can be the bearer of this fundamental right to just administrative action and claim on the basis of section 33 that prior notice of the intervention is a precondition for the intervention. This would require a *horizontal* application of the provision of the bill of rights *between government structures*. Without venturing into the thorny issue of horizontal application, a few comments can be made.

Section 8 stipulates that juristic persons are entitled to the rights in the bill of rights to the extent required by the nature of the rights and the nature of that juristic person. It is clear that "there are rights which juristic persons are capable of acquiring, such as administrative justice".[24] A municipality is a juristic person. Is it entitled to the right to administrative justice in relation to the exercise of administrative power by the province? The preferred view is that it cannot. In general, the state is not the beneficiary of the

Comment [41]:
Comment [42]:
Comment [43]:

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[23] Section 23 of Schedule 6 entails another provision that applies until the legislation envisaged in 33(3) is enacted. For the sake of argument, section 33 is referred to.
[24] D Basson, *South Africa's Interim Constitution, Text and Notes* (1994) at pg. 20.

rights, entrenched in the bill of rights. The bill of rights *binds* the state and is a restraint on the state in its relations to its citizens.

> "A bill of rights sets limits to government actions when *individual* interests are restricted for the protection of community interests."[25]

In the context of the issue of horizontal application, Devenish makes the following remark:

> "Traditionally a bill of rights was conceived and designed to protect individuals against abuse of state power."[26]

In this, the gist of the argument lies. The bill of rights governs relations between individuals and the government and (to the extent of the horizontal application) between individuals. Relations between different government structures are not governed by the bill of rights. These relations should be governed by the principles of co-operative government. Therefore, it is submitted that the right to just administrative action cannot be the basis for asserting that prior notice is a precondition for a section 139 intervention.

3.2.2 Prior notice requirement, based on common law?

In this paragraph, the second possible 'avenue' for arriving at a prior notice requirement will be explored. The question is whether or not it is possible to construe a requirement of prior notice on the basis of common law. A short description follows of the common law requirements relevant in this context.

Baxter explains that the notion of 'natural justice' has crystallised into two fundamental principles: *audi alteram partem* and *nemo iudex in propria causa*.[27] Only the first principle is relevant here. The principle of *audi alteram partem* requires a 'fair

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[25] Rautenbach and Malherbe, *supra* n2 at pg. 8 (emphasis added).

[26] G E Devenish, *A Commentary on the South African Bill of Rights,* Butterworths, Durban (1999) at pg. 24.

[27] L Baxter, *Administrative Law*, Juta, Cape Town (1984) at pg. 541.

hearing'.[28] The two fundamental requirements based on the notion of a 'fair hearing', to which an affected party is entitled, are the 'notice of intended action' and a 'proper opportunity to be heard'.[29] Since natural justice seeks to promote an objective and informed decision, the decisionmaker must make himself aware *and consider* the submissions of the persons likely to be affected by the decision. An affected party must be given adequate notice of the possibility that administrative action may be taken against him.[30] The notice should also stipulate how, where and when representations can be made.[31] The requirement of a 'proper opportunity to be heard' entails *inter alia* that the affected party must be properly apprised of the information and reasons which underlie the impending decision to take action against that party.[32] Another requirement that is important in this regard is the requirement that the affected party 'must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations'.[33]

In sum, there are four basic requirements for an administrative decision that are relevant in the context of a section 139 intervention, namely -

a) notice of intended action;
b) reasons for the decision;
c) reasonable time to prepare representation; and
d) the requirement that the submissions are considered.

Thus, it can be argued that a requirement of prior notification for a section 139 intervention can be based on common law. Does this mean that section 139(a) *constitutes* the requirement of 'prior notice'? The answer is that it does not. Because then the exercise would be to interpret section 139(1)(a) and (b) and to conclude that they must be linked to each other, *by using the common law rule of 'prior notice' as a tool for*

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[28] Baxter *supra* n9 at pg. 542.
[29] Baxter *supra* n9 at pg. 543.
[30] Baxter *supra* n9 at pg. 544.
[31] Baxter *supra* n9 at pg. 545.
[32] Baxter *supra* n9 at pg. 547 and the authorities cited and quoted there. See also pg. 568-569 and 227-228.
[33] As Colman J put it in *Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture* 1980 (3) SA 476 (T) at 546, quoted in Baxter *supra* n9 at pg. 551.

interpretation. That would stand matters on their heads. The Constitution is to be used for the development of common law and not the other way around, where common law is used for the interpretation of the provisions of the Constitution.[34] Besides, a notice is not the same as a directive. A directive compels the municipality to perform certain detailed acts. A notice merely notifies the province's intention to issue the directive, provides the municipality with the reasons why it is considering to do so and affords the municipality the opportunity to respond to the allegations. Therefore, even prior to issuing a directive, the province will have to send the municipality a notice of its intention to do so. If, after the directive has proved to be unsuccessful, the province wants to assume responsibility in terms of section 139(1)(b) it will have to send a notice again, allowing the municipality to dispute the non-fulfilment of the content of the directive.

3.2.3 Prior notice requirement on the basis of co-operative government?

The third possible 'avenue' for arriving at the conclusion that prior notice is a precondition for an intervention can be found in the principles of co-operative government. Chapter 3 of the Constitution deals with co-operative government:

> "All spheres of government must observe and adhere to the principles in this chapter and must conduct their activities within the parameters that the chapter provides."[35]

In other words, intergovernmental relations should be governed and guided by the principle of co-operative governance. The primary objective of co-operative governance is to minimise the negative consequences that decentralisation of government necessarily entails.[36]

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[34] Compare: section 39(2) of the Constitution..
[35] Section 40(2) of the Constitution.
[36] N Steytler, 'Decentralisation of Government and the Reform and Transformation of the Public Service in South Africa - A Constitutional Perspective', 1998 *Presidential Review Commission Report* (Anexure D) at pg. 4.

The content of co-operative governance is laid down in the "principles of co-operative government and intergovernmental relations" of section 41.[37] The idea behind co-operative government is similar to the German "Bundestreue". In short, the "Bundestreue" is an unwritten constitutional norm that stipulates that the federal government and the states must operate in good faith.[38] Co-operative government in South Africa should function in a way, similar to its German equivalent. Its principles are a "justiciable framework" for intergovernmental relations.[39]

The two principles in section 41(1) that are relevant in our context are the following:

> "All spheres of government and all organs of state within each sphere must -
> (...)
> (e) respect the constitutional status, institutions, powers and functions of government in other spheres
> (...)
> (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere
> (...)"

Respect for the constitutional status of local government and the prohibition of encroaching on the institutional integrity of local government is important in the context of section 139. It means that the province, in exercising its power to intervene, must be guided by the notion that the Constitution affords local government a considerable degree of autonomy. That constitutionally protected autonomy prevents provinces from using section 139 in a sweeping way, without respect for the status of local government.

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[37] It seems to me that the list of principles in section 41(1) is not meant to be an exhaustive one. Co-operative governance entails more that what is laid down in section 41(1). Rautenbach and Malherbe, however, seem to think otherwise when they list the principles, *supra* n2 at pg. 255.
[38] B de Villiers, 'Intergovernmental relations: the duty to co-operate - a German perspective', (1994), *SA Public Law* 430 at 432.
[39] Rautenbach and Malherbe *supra* n2 at pg. 255.

The question that needs to be answered is whether or not it is possible to use co-operative government as a basis for a requirement of prior notice and how this requirement is to be construed.

3.2.3.1 Applicability of co-operative government in the context of section 139

In the context of section 139, the 'negative consequence' of decentralisation that co-operative government seeks to minimise is the abuse of autonomy that the Constitution affords local government[40] and the neglect of duties and responsibilities that come with that autonomy. It is worth noting that the objective of section 139 rests on the very same notion: to minimise the possible negative consequences of local autonomy.

Steytler distinguishes between two types of intergovernmental relations and holds that the nature and content of co-operative government depend to a large degree on the type of relation to which it is applied.[41] A distinction should be made between relations of equality and relations of hierarchy.

In relations of equality, the different government structures are on equal footing. The relations are the product of their endeavours and joint action is characterised by consensus. There is no question of hierarchy or subordination. These relations exist *within* spheres of government and *between* spheres government. Relations between different spheres, for example the relation province - local government, are relations of equality for as far they do not take place within constitutional systems of overrides, intervention or regulation. Steytler argues that these relations are the primary focus of co-operative government. He arrives at this conclusion by pointing at the *content* of the principles of co-operative government. Especially the rules relating to maintaining respect for the status of each sphere[42] indicate that relations of equality are the primary

[40] See sections 151 and 40(1) of the Constitution.
[41] Steytler *supra* n18 at pg. 5.
[42] Section 41(1)(e) - (h).

concern of co-operative government. Therefore the principles of co-operative government apply *directly* to these relations of equality.

However, the three spheres of government are not equal. There is an undeniable hierarchy. The Constitution recognises this hierarchy and establishes "clear lines of subordination between the three spheres of government".[43] Examples are sections 44(2),[44] 155(4) and, of course, section 139. It seems that intervention in another sphere conflicts with the very nature of co-operative government. But on the other hand, as argued above, the intervention serves the same purpose as co-operative government, namely the purpose of mitigating the tension that can arise between decentralisation and efficient administration. It is submitted that intervention and co-operative government, in serving the same purpose, do not necessarily have to be enemies. Co-operative government is aimed at more than only equal relationships. The principles of co-operative governance also apply within the context of a section 139 intervention. However, the application of the principles must be tailored to the verticality of the relationship.

Thus, the principles of co-operative governance apply in the context of section 139 and can serve as a basis for a prior notice requirement. How is this requirement to be construed?

Firstly, an 'extra' procedural requirement of prior notice exists, apart from section 139, on the basis of co-operative government. This requirement compels the province to notify the municipality and allow it to respond, before it issues a section 139(1)(a) directive and before it assumes responsibility in terms of section 139(1)(b). Secondly, the principles of co-operative government inform a purposive reading of section 139 and induce the province to adhere to the principle of least interference with the consequence that a section 139(1)(b) intervention is not possible without first issuing a section 139(1)(a)

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[43] Steytler *supra* n18 at pg. 6.

[44] "Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary -

(...)

directive. In other words, subsection 139(1)(a) should be read as a requirement for subsection 139(1)(b).

Part II

Procedural requirements after the assumption of responsibility

3.3 Approval by the Minister

If a province intervenes by assuming the responsibility in terms of section 139(1)(b), subsection (2) kicks in and introduces a number of procedural requirements.

The Minister, responsible for local government (at present that is the Minister for Provincial and Local Government) must approve the intervention within 14 days after its initiation. What possible choices does the Minister have and what are their consequences?

a) The Minister can disapprove the intervention. That means the end of the matter. The intervention ends, the Municipal Council resumes its full responsibility, the administrators must withdraw from of the municipality and cease to perform all their functions in terms of the intervention.[45]

b) The Minister can approve the intervention. The question arises, whether the Minister has the power to set terms to his or her approval. The answer must be that the Minister can. There is no doubt that the National Council of Provinces (NCOP) has the power to set terms to its approval, since it must review it and make recommendations. And the text of subsection 139(2)(a) (approval by the Minister) is similar to subsection 139(2)(c) (approval by the NCOP) to such an extent that it can be assumed that the Minister can also set terms. It would be illogical and subversive to the text of section 139(2), if the Minister would be afforded less power than the NCOP in a phrase of exactly the same wording. Therefore, the Minister has the option of approving the intervention under certain terms.

c) The Minister can approve the intervention unconditionally.[46]

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[45] For a discussion of the validity of actions, taken by the administrator(s) in terms of the intervention, see paragraph 3.5.

[46] See Butterworth intervention, paragraph 5.6.

From the moment of the approval by the Minister (whether or not conditionally), the intervention carries the authority of the Minister and he or she can be held responsible for that decision.

3.4 Notice in provincial legislature and National Council of Provinces

Section 139(2)(b) stipulates that a notice of the intervention should be tabled in the provincial legislature and in the NCOP within 14 days of their respective first sittings after the intervention began. It seems that this has to take place, even in the event of a disapproval by the Minister. In other words, if the Minister disapproves the intervention and the intervention ceases, a notice must still be tabled in the provincial legislature and in the NCOP. A section 139(1)(b) intervention is a serious motion of no confidence in that municipality, the initiation of which alone (even when the Minister ends the intervention) is a serious matter that at least needs to be known in the provincial legislature and in the NCOP. However, it is unclear what the consequences are of a failure of the Provincial Executive to table the notice of the intervention according to section 139(2)(b). The intervention has ended anyhow, since it lacks the necessary ministerial approval.

3.5 Approval by the National Council of Provinces.

The NCOP must approve the intervention within 30 days of its first sitting after the intervention. The options for the NCOP are the following:

a) The NCOP can disapprove the intervention. In that case, the NCOP 'overrules' the decision taken by the Minister. Again, the intervention ceases after the NCOP's disapproval. What is then the status of the actions, taken by the administrators, in terms of the intervention? Do they remain valid or do they become invalid retrospectively on the moment of disapproval by the NCOP? Two views are possible.[47] One view is based on the literal wording of section 139(2)(c). That

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[47] See N Steytler, 'An Analysis of the Constitutional Provisions of Section 100 of the Constitution', paper presented on Conference on Intergovernmental Relations and Provincial Government, Department of Constitutional Development, 29 and 30 March 1999, Gallagher Estate, at paragraph G(2).

subsection provides that "the intervention must end" unless approved by the Minister. The argument, based on the literal wording of this phrase suggests that the intervention is lawful until such time it is disapproved. The decision of the NCOP concerns the *continuation* of the intervention and not the *initiation*.[48] Accordingly, all actions taken by the provincial executive before the date of dissaproval remain valid. The Provincial Executive could have executed a fair amount of actions because of the fact that a considerable time-period can lie between the start of the intervention and the NCOP's first session.[49] Therefore, should the NCOP's disapproval have no effect whatsoever on any action completed by the national executive, its reviewing role would be severely undermined. The converse position is that the NCOP's disapproval renders any decision, taken in terms of the intervention invalid. This however, deviates from the wording of section 139(2)(c). A solution could be, as Steytler suggests in the context of section 100 interventions, to invest the NCOP with the power to decide what the consequences are of its disapproval.

Does the same problem arise with regard to the approval by the Minister in terms of section 139(2)(a)? The time period between the start of the intervention and the approval can never be more than 14 days, which reduces the threat of *faîtes accompli* to the role of the Minister's approval significantly. It is therefore submitted that with regard to the disapproval by the Minister, the literal wording of the text should be followed and actions taken before disapproval remain valid.[50]

b) The NCOP can approve the intervention under certain terms. In most cases of approval, the NCOP is likely to set terms, since it has to establish the framework against which the intervention can be reviewed in terms of subsection 139(2)(d). What happens if the NCOP disagrees with the terms, set by the Minister? The argument could be that, in that case, the NCOP 'cannot' approve the intervention, in

[48] This approach can be contested by argueing that the decision by the NCOP is aimed at more than just the question whether or not *continuation* of the intervention is appropriate but also at the question whether or not the decision to intervene is being implemented lawfully. An elaborate discussion of this conceptual problem, however, cannot be presented within the limited scope of this paper.
[49] See paragraph 3.4.

the form as it has been presented to the NCOP and that the intervention should therefore cease. But this is illogical because a (necessary) intervention would then end as a result of a disagreement between the NCOP and the Minister. It is therefore submitted that the NCOP can set its own terms and that the Minister's terms lapse if the NCOP sets new ones. It would be unwise to allow both sets of condition to co-exist, even if they seem to coincide. If the intervening province has to comply with two sets of conditions, it is likely to result in problems of interpretation. Therefore, the preferable position is that the Minister's terms lapse, if the NCOP sets new ones.

c) The NCOP can approve the intervention without setting any terms. It seems unlikely that the NCOP would approve an intervention without establishing the framework, that it needs to review the intervention (s 139(2)(d).

d) Section 139(2)(c) and 139(2)(d) read together, inform the conclusion that the NCOP can also disapprove the intervention *after an initial approval*. If the NCOP, in reviewing the intervention, comes across any element of the intervention that is not consistent with section 139 or that falls outside the scope of the intervention, it can terminate the intervention by withholding further approval.[51]

As alluded to above, the NCOP can 'overrule' the Minister's decision. But it can only do so in two ways. It can overrule a Minister's approval and it can replace the Minister's terms with its own. If the Minister disapproves the intervention and the NCOP is of the opinion that an intervention is necessary, there is nothing the NCOP can undertake. It does not have the power to initiate an intervention and it cannot overrule a ministerial disapproval, since the intervention has already ended upon that disapproval.

The scheme, set up by section 139(2) means that there are two approvals by two different organs at different times, whereby one approving organ can (partly) overrule the other. What is the idea behind this? It is submitted that one function of this scheme is to 'fill

[50] The same argument as under note 30 can be raised with regard to the ministerial approval.
[51] See Steytler *supra* n29 at paragraph G(4).

the gap' if Parliament is in recess and cannot decide over an intervention within a reasonable time. In such an event, the intervention will at least be authorised by the Minister. Another function of the two approvals is to provide a system of checks and balances whereby the stakeholders at national level have a certain role and certain powers and where they 'check' and 'balance' the other one's power.

3.6 Summary of Part I and Part II

The question whether a prior notice should precede a section 139(1)(b) intervention and whether the section 139(1)(a) directive can be regarded as a prior notice requirement was discussed. The conclusion is that a prior notice requirement can be construed on the basis of common law and on the basis of the principles of co-operative government. The consequence of the argument, based on common law is that prior to issuing a directive or assuming responsibility, a prior notification with an opportunity to respond is necessary. The consequence of the argument, based on co-operative governance is the same *plus* the conclusion that the section 139(1)(a) directive is meant to be a requirement for a section 139(1)(b) intervention.

This Part dealt with the required approvals by the Minister and the NCOP, their choices and the consequences of their decisions. The conclusion is that the NCOP can 'overrule' the Minister's decision in two ways. The NCOP plays a larger role than the Minister and the function of the ministerial approval is to 'fill the gap' in a recess and to form a system of 'checks and balances' at national level.

CHAPTER 4

DEFINING THE POWERS

When a province intervenes in terms of section 139, how far can it go? What is the extent, to which intervention is permitted by section 139? Part I of this chapter discusses what the powers of the administrators are and what residual powers the Council therefore has after the assumption of responsibility. It also discusses a provision in the new Municipal Structures Act, which deals with the power of the member of the executive council of a province, responsible for local government (MEC) to dismiss the Municipal Council after an unsuccessful intervention. Part II of this chapter deals with the permissible duration and extent of the assumption of responsibility.

Part I

Powers of the provincial executive

4.1 'Executive' obligation

Section 139 deals with a municipality's failure to 'fulfil an *executive* obligation'. As alluded to above, it appears that section 139 is not concerned with the municipality's *legislative* authority, namely its authority to make by-laws. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC),[52] the Constitutional Court established authoritavely the status of local government as an autonomous sphere of government. The Court held that a Municipal Council is "a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself".[53] The administrator's powers will be exclusively *executive* by nature. They do not have the power to legislate. This distinction is not only important in terms of a limit on the inroad into local autonomy, but also in terms of the fundamental principle of separation of powers: the democratically elected Council can legislate and not the administrators, who are part of the provincial administration and are accountable to the provincial executive.

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[52] 1998 (12) BCLR 1458 (CC), see also N Steytler and J de Visser, 'Constitutional Court Affirms the Status of Local Government', *LGL Bulletin* 1999(1) 6.
[53] At paragraph 26 of the judgment.

Thus, the Council of a municipality that is subject to a section 139(1)(b) intervention can never loose its legislative power. Therefore, the Council cannot be removed from office or pushed aside completely. Even in the event of a 'full scale' section 139(1)(b) intervention, whereby the entire administration is run by the administrator, it will retain its power and duty to legislate. Accordingly, the councillors have access to municipal buildings, they are allowed to meet there and use venues and they have access to all amenities that enable them to fulfil their legislative duty, such as offices, computers, documentation etc.[54] However efficient and convenient it might be for the administrators to do their job, without being hampered or inhibited by the presence of the councillors, the Constitution remains clear: section 139 is concerned with the municipality's *executive* obligations only and the Municipal Council is the democratically elected organ in the municipality and therefore retains its power to legislate.

4.2 The Municipal Structures Act

The new Municipal Structures Act,[55] which contains a provision, that is related to section 139, complicates this matter. In terms of section 34(3)(b), the Minister responsible for local government in the province (MEC) can dissolve a Municipal Council if -

> "an intervention in terms of section 139 of the Constitution has not resulted in the council being able to fulfil its obligations in terms of legislation."

The MEC needs the concurrence of the Minister and approval, by resolution, of the NCOP.

In this section, provincial government in concurrence with national government, is given the power to disband a Municipal Council. To ensure the constitutionality of this threat to local autonomy, provision had to be made in a recent constitutional amendment. Section 159, dealing with the term of Municipal Councils now reads:

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[54] See Butterworth intervention, paragraph 5.8.2.

> "(1) The term of a Municipal Council may be no more than five years, as determined by national legislation.
> (2) If a Municipal Council is dissolved in terms of national legislation, or when its terms expires, an election must be held within 90 days of the date that Council was dissolved or its term expired.
> (3) A Municipal Council, *other than a Council that has been dissolved following an intervention in terms of section 139*, remains competent to function from the time it is dissolved or its term expires, until the newly elected Council has been declared elected."[56]

Section 159(3), as amended, makes provision for the event, where a Council has been dissolved following an intervention in terms of section 139. However, it does not address the issue of the constitutionality of section 34(3)(b) sufficiently. Section 34(3)(b) amounts to the most infringing intervention possible and therefore poses a serious threat to the institutional integrity of local government. Section 139 itself makes it abundantly clear that no intervention can affect the legislative capacity of the Council. The Structures Act ignores this by providing for the dissolution of the entire Council. By merely *touching on the consequences of such a dissolution* and not facing the grave inroad of section 34(3)(b) of the Structures Act into the institutional integrity of local government fully, this amendment harms to the spirit of the Constitution.

Another real and practical problem arises out of the fact that it is unclear under which circumstances the MEC can dissolve the council. Section 34(3)(b) does not indicate *which form of section 139 intervention* should precede dissolution. Which form of intervention opens up the route to dissolution of the council? Would that be *any* kind of section 139 intervention or only the intervention, whereby the Provincial Executive assumes responsibility? Or does this section refer to both of the *listed* interventions in subsections (1)(a) and (1)(b)? The most logical interpretation of section 34(3)(b) seems to suggest that the route to dissolution is only open after an unsuccessful section 139(1)(**b**) intervention, where the province assumed responsibility. But the text of section 34(3)(b) suggests that *any* kind of unsuccessful section 139 intervention opens up the route to dissolution. That means that a failure of a Council

[55] Act 117 of 1998.

to perform the steps, detailed in a section 139(1)(a) directive, could be seen as a reason for the Provincial Executive to initiate the procedure for dissolution. Taken to the extreme, even *any* action, taken by the provincial executive, which has been labelled as a 'section 139 intervention' and was unsuccessful, could trigger the procedure for dissolution. The wording of this provision is very untidy.

A third difficulty arises with regard to the 'caretaker provision' of section 34 of the Municipal Structures Act, which provides for the appointment of 'administrators' by the MEC, when a Council is dissolved or does not have enough members for a quorum. These administrators 'ensure the continued functioning of the municipality until a new Council is elected or until it has sufficient members for a quorum. This opens the possibility for a full scale assumption of responsibility 'through the backdoor'. The Provincial Executive can issue a section 139(1)(a) directive and dissolve the Council if the implementation by the Council of the directive was 'unsuccessful'. Until the next elections, administrators appointed by the MEC run the municipality, as if it were a section 139(1)(b) intervention. Significantly, approval from neither the national Minister nor the NCOP is required.

4.3 'Relevant' obligation

Section 139(1)(b) provides for the assumption of responsibility for the *relevant* obligation. That means that, if the intervention is limited to a specific functional area (say for example 'traffic'), the administrators have (executive) power only in connection with that specific area. The province cannot decide to intervene because of a chaos in traffic in a municipality and decide to revamp the municipality's electricity infrastructure in the process. Any powers that fall outside the scope of the intervention, fall back into the lap of the Municipal Council.

If follows therefore that it is of utmost importance that this scope should be clear, for it determines the powers of both administrators and Municipal Council. This reaffirms that it should be possible to trace the intervention back to an obligation laid down in a

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[56] As amended by Act 65 of 1998 (emphasis added); see also J Mettler, 'Local Government Elections, Extending the Interim Phase', *LGL Bulletin* 1999(1) 7.

specific statute.[57] If a province intervenes and refers to the general objectives of local government, it is impossible to determine what the exact mandate and the exact powers of the administrators and what therefore the residual powers of the Municipal Council are.[58]

4.4 Power relations

With regard to the assumption of responsibility in terms of the section 139(1)(b) intervention, it is important to deal with the relation between the administrators, the provincial executive, the Municipal Council and the NCOP. In other words; who is actually pulling the chords, in the event of a section 139(1)(b) intervention? What does the hierarchy look like after intervention and in what capacity are the administrators acting after the intervention?

4.4.1 The relation between the administrators and the Municipal Council

It can be argued that the administrators' duty is to assist the Council and it can be emphasised that the Council still consists of the democratically elected representatives of the local community, even after the section 139(1)(b) intervention. The argument would then be that the administrators are accountable to the council, because it is the 'highest organ' in the municipality. However, this approach would undermine the object of section 139(1)(b). Especially in the case of a Council that is 'unwilling' to fulfil a certain executive obligation,[59] any subordination of the administrators to the Council would be unworkable. The text of section 139 also seems to indicate otherwise. Section 139(1)(b) speaks of "assuming (taking over) responsibility". If the province takes over responsibility for a specific function, it is in charge of that function. If it would have to answer to the council, it would not be 'responsible' anymore. Therefore, the administrators, in and to the extent that they fulfil the obligations that they are responsible for,[60] are not accountable to or subordinate to the Municipal Council.

4.4.2 The relation between the administrators and the provincial executive

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[57] See paragraph 2.2.
[58] Apart from their legislative powers.
[59] See paragraph 2.3.

According to the text of section 139, it is the Provincial Executive that "assumes responsibility". In other words: the Provincial Executive takes over the responsibility through the appointment of the administrators. It must follow that the administrators are directly accountable and subordinate to the provincial executive. After they have been 'detached' to the municipality, they remain in the same position in the provincial hierarchy as compared to their position before the intervention.

4.4.3 The National Council of Provinces

The NCOP must review regularly and make appropriate recommendations. On approval, it must establish a time frame for the review. The NCOP can order that the intervention must end.[61] In other words, there is a line of subordination between the NCOP and the Provincial Executive in the context of section 139. However, the NCOP performs a role that cannot be characterised as 'being in charge of the intervention'. It is the Provincial Executive that is in charge of the intervention and that is the organ that 'pulls the chords'. The NCOP plays a supervisory and controlling role, acting from a distance. It does not occupy itself with the daily business of the intervention. But when it comes across any element of the intervention that is not consistent with section 139 or that falls outside the scope of the intervention, it can withhold further approval. A distinction should be made between the 'terms', which the NCOP can set, connected to its approval and 'recommendations', made in terms of section 139(2(d). The 'terms' are the 'parameters', the 'outer boundaries' of an intervention. Here, the NCOP acts as a constraint on the Provincial Executive. However, as alluded to above, the NCOP cannot prescribe the Provincial Executive what to do. It can only review actions, taken by the Provincial Executive. Then again, its close envolvement in the process allows the NCOP to assist the provincial executive by making non-binding 'recommendations' regarding the implementation of the intervention.[62]

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[60] This question is irrelevant for areas that fall outside the scope of the intervention for the administrators have no power and no responsibility there.
[61] See paragraph 3.5.
[62] See N Steytler, 'An Analysis of the Constitutional Provisions of Section 100 of the Constitution', paper presented on Conference on Intergovernmental Relations and Provincial Government, Department of Constitutional Development, 29 and 30 March 1999, Gallagher Estate, at paragraph E(7).

4.4.4 In what capacity are the administrators performing their functions?

The question arises as to whether the administrators are acting as organs of the municipality or as organs of the province. The answer to this question has substantial consequences with regard to the costs of the intervention and the liability for actions by the administrators. The South African Police Services Act stipulates that the municipality carries the costs for intervention in terms of that Act.[63] The MEC for Safety and Security may intervene in a municipality when he or she is satisfied that the municipal police service has failed to comply with the Act or with the regulations, promulgated in terms of the Act. Section 139 of the Constitution applies. The relevant municipality carries the costs of all expenditures incurred by the MEC in connection with the intervention. The question is whether this is an appropriate implementation of section 139. Two arguments can be made.

On the one hand, it can be argued that the administrators are acting as organs of the province. Again, according to the words of section 139, it is the Provincial Executive that assumes the responsibility. The most essential part of this assumption of responsibility in terms of section 139(1)(b) is the sending of the administrators. They are appointed by the Provincial Executive in the exercise of the provincial power to intervene in terms of section 139 and they can be called back by the Provincial Executive at any moment after the intervention. Apart from this argument based on the interpretation of section 139, it can also be asserted that it does not seem logical that the municipality would have to pay the costs of the intervention. Even though the intervention is a result of the municipality's incompetence, inability or unwillingness, the province remains the organ that decides to intervene and that claims to have good reasons for it. To allow the province to do so, not at own expense but at the expense of the municipality, would open the door for abuse of section 139. Moreover, when the administrators would be remunerated out of funds, belonging to the municipality, it could blur the division of the powers between provincial executive, administrators and Council and could harm the logic of the relationships discussed above.

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[63] Act 68 of 1995, as amended by Act 83 of 1998, see N Steytler, 'Municipal Police Services, Towards a Safer Environment', *LGL Bulletin* 1999 (2) 9.

On the other hand, just to say that all the costs of the intervention should be borne by the province *per se*, could result in unfairness. In the event of a municipality deliberately refusing to fulfil a certain duty or deliberately neglecting it, although it is capable of performing satisfactorily, it seems unfair to place the financial burden of intervention entirely on the province.

It can be concluded that, in general, the administrators 'wear a provincial hat' during the performance of their duties. Accordingly, the province is liable for actions by the administrators and the costs as a result of their appointment are to be paid by the province. But where the reason for the intervention lies in obstructionism by a municipality, it should be possible to put the financial burden on the shoulders of the obstructer. It is submitted that there is a role to play by the NCOP, being the 'supervisor' of the intervention. The NCOP could be designated as the organ that decides which party bears the costs of the intervention.[64]

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[64] As proposed by N Steytler in 'An Analysis of the Constitutional Provisions of Section 100 of the Constitution', unpublished paper, Community Law Centre (UWC), at pg. 16

Part II

Extent and duration of the intervention

4.5 The extent of the section 139(1)(b) intervention

Section 139 affords the Provincial Executive a discretion to decide on the *form* of the intervention and on the *extent* of the intervention.

With regard to the *form* of the intervention, the discretion means that the Provincial Executive has a choice between different forms of intervention. It can decide, for example, to stop the intervention after the issuing of a section 139(1)(a) directive has proved to be successful or to send another directive after the first one failed. It can also limit the intervention to support and advice. With regard to the *extent* of the intervention, the discretion means that the Provincial Executive can decide over the question as to how far-reaching the intervention will be. This is important, especially with regard to the assumption of responsibility. The Provincial Executive has to decide what the extent of the assumption of responsibility will be. It can be appropriate to assume 'overall' responsibility for the administration of the municipality,[65] but it can also be appropriate to assume responsibility for only one particular functional area (eg traffic or electricity). Another important issue, related to the *extent*, is the *duration* of the intervention: how long are the administrators going to be running (parts of) the municipality?

4.6 The duration of the section 139(1)(b) intervention

Undoubtedly, one of the most important aspects in this regard is the *duration* of the intervention. Two questions arise. Who decides when a section 139(1)(b) intervention should stop? And what are the criteria that determine how long a section 139(1)(b)-intervention can last?

It is submitted that, in principle, it is the Provincial Executive that decides when the intervention ends. The Provincial Executive is primarily responsible for managing the intervention and seeing to it that the intervention does not last longer than necessary. However, the NCOP, tasked with reviewing the intervention, can decide that the

[65] See Butterworth intervention, paragraph 5.2.1.

intervention must end, when it is of the opinion that a continued intervention would infringe the institutional integrity of the relevant local authority. With regard to the criteria to be used for determining how long the intervention can last, it is useful to look at the intervention in Butterworth. Here, the Eastern Cape Provincial Executive linked the duration of the intervention to the duration of the investigation by the Heath Commission as well as the duration of all legal proceedings in connection with its findings.[66] These criteria are very uncertain because they imply that a municipality, even when it has regained full capacity to fulfil the relevant executive obligation, can be administered by the province until all appeal proceedings have been finalised, which can take several years. Instead, the criteria to be applied should be germane to the *purpose* of the intervention. In other words, they should relate to the jurisdictional facts that gave rise to the intervention.

4.7 Minimal intervention : the need to objectify the duration and extent of the intervention

There is a need to *objectify* the duration and extent of the intervention. As alluded to above, there is also a need to objectify the substantial requirements for the intervention. The two should be linked together. In other words, the *extent and length* of the intervention should be inextricably linked to the *purpose* of the intervention, as indicated by the White Paper on Local Government, where it states that:

> "Where intervention is required, the level of intervention needs to be appropriate to the context (...)."[67]

The intervention should cease when the reason for the intervention has been removed or remedied. This seems an oversimplification. However, it does entail a fundamental choice between intervention with the object of achieving some sort of 'minimum standard' and intervention with the object of not only achieving a minimum standard but also 'boosting' the municipality's administration to a level that is 'above average'. It is hard to imagine nor hard to understand a province that sees the intervention as its chance to finally 'make this municipality work once and for all' and, in its laudable ambition, takes the intervention further than it was initially intended for.

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[66] See Butterworth intervention, paragraph 5.3.

The choice for a 'minimal intervention' is based on the principles of co-operative governance which instructs the three spheres of government to refrain from infringing on each other's institutional integrity.[68] Local government, being an independent, autonomous sphere of government is entitled to that protection. There are clear indications with regard to this in the text of section 139, where it speaks of '*essential* national standards' and 'established *minimum* standards'.

4.8 How to objectify

The logical question that follows is: *How* should the extent of the intervention be objectified and *how* should the discretion of the Provincial Executive be limited? Two remarks can be made in this context. Firstly, these 'minimum standards' and 'essential national standards' that the Constitution speaks about should be translated into a list of practical criteria that can be tested. They should be put on paper so that the requirement of 'failure to meet minimum standards' becomes more objective and useful. Secondly, the role of the NCOP in this context should be emphasised. The NCOP, in deciding whether or not it will approve the intervention, plays a distinctive role in determining whether a particular municipality meets these 'minimum criteria'. Furthermore, the NCOP plays a similar role, in the process *after* the intervention, in determining whether, and if so when, these standards are met and whether the reason for the intervention has ceased to exist.

4.9 Summary of Part I and Part II

The administrators have the power only to fulfil *executive* obligations that are *relevant*, in the sense that the failure to fulfil *that* obligation should have been the reason for the intervention. They are accountable to the Provincial Executive and act in their capacity as provincial officials. The NCOP plays a supervisory and controlling role: the daily business of the intervention is the provincial executive's concern. The NCOP can, however, end the intervention when it is of the opinion that a continued intervention would infringe the local authority's institutional integrity.

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[67] White Paper on Local Government, March 1998 at pg. 45
[68] Section 41(1)(e) of the Constitution.

Just as there is a need to objectify the substantial requirements for intervention, there is the same need to objectify the criteria for the duration and the extent of the intervention. In that regard, a ‘minimal intervention’ approach should be adopted, meaning that the intervention should cease, once the reason for the intervention no longer exists. In order to objectify the criteria for the duration and extent of the intervention, the terms ‘minimal standards’ and ‘essential national standards’ should receive attention and should be translated into criteria that are more practical. And the role of the NCOP in monitoring and reviewing the intervention should be emphasised.

CHAPTER 5

CASE STUDY: THE BATTLE OF BUTTERWORTH[69]

Butterworth, an industrial and business centre halfway between East London and the former Transkei capital of Umtata, made history as the first municipality to be subjected to an intervention by provincial government under the 1996 Constitution. The Eastern Cape Provincial Executive intervened in the Butterworth Transitional Local Council and assumed full responsibility for the administration of Butterworth.

5.1 Background to the intervention

Butterworth had been beset with a host of problems. It suffered from administrative and financial problems, largely inherited from earlier lack of administrative competence in the homeland of Transkei. Basic services were not being provided in a sustainable manner, there were allegations of fraud, nepotism, corruption and misuse of municipal assets by councillors. The collection of arrear rates and taxes had been completely neglected. This left the municipality on the verge of complete financial collapse.

At the end of February 1998, Butterworth's financial predicament resulted in its failure to pay the municipal workers their wages. They embarked on a strike, leaving the municipality in a situation where, according to a Senior Superintendent of the SAPS stationed at Butterworth, 'all services came to a complete standstill'.[70] Refuse was not being collected and the town was deprived of water for three full days, which posed a serious threat to the health of the residents. At the same time, there was a threat that electricity supply to the municipality would be severed. There were continuous protest actions, organised by local political parties, civic organisations and unions, resulting in a state of civil unrest in Butterworth. The allegations of fraud, corruption and mismanagement gained momentum in a preliminary report of the Heath Commission. This report divulged the status of investigations by the commission and noted unauthorised payments, improper appointments, unauthorised

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[69] Published in *LGL Bulletin* 1999 (2) 13.

use of municipal property and services, maladministration and huge outstanding amounts of taxes and rates.

The MEC for Housing and Local Government in the province reacted to these mounting problems in Butterworth by sending a letter, in which a meeting was requested within 24 hours. The MEC pointed at the council's failure to deliver services, to promote a safe and healthy environment and to promote the development of the municipality. In general, the MEC stated, the municipality failed to fulfil its obligations in terms of the Constitution. In the meeting that took place the following day (12 March 1998), assurances were given by the Butterworth TLC that the situation was actually improving and normalising.

However, on 13 March it was discovered that there was no improvement at all, but rather a further deterioration: the hospital was now also under threat of closure, the strike continued and business and education institutions were closed. The MEC visited the town and met with relevant stakeholders, including business, municipal workers and political structures. They demanded the dissolution of the council. In a meeting with the council, the MEC requested the Council to step aside and allow the province to take over the administration of the town.

The Council acknowledged its inability to perform, and requested intervention by the province, but on its own terms. It sought to place the blame for the state of affairs in Butterworth on certain groups and factions outside the council. It also wanted to negotiate which powers were to be taken from the Council and wanted the intervention to be limited to the restoration of basic services and to the duration of the emergency. These terms were unacceptable to the MEC, who subsequently obtained a mandate from the Provincial Executive to send a directive in terms of section 139(1)(a) of the Constitution.

5.2 The section 139(1)(a) directive

In the directive, dated 16 March, the MEC listed the shortcomings of the council:

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[70] This case study is based on the documentation, submitted to, and filed at the NCOP together with the request for approval for the intervention by the Eastern Cape province on 30 March 1998. It formed

- administrative and financial chaos;
- failure to collect a substantial amount in arrear rates and taxes;
- the severance of water supply to residents of Butterworth;
- the threat to cut electricity;
- discontinued or irregular provision of other services, such as refuse and sewage removal;
- the health risk for the residents as a result of this;
- the closure of businesses;
- civil unrest;
- the hostility between the Council and the community; and
- mismanagement, fraud, nepotism and unauthorised use of municipal property and services by councillors.

In general, the directive stated that the Council had not been complying with the provisions and/or underlying values and principles of the Constitution. The directive explained why the MEC found the terms, under which the Council would step aside, unacceptable or irrelevant. The appointment of blame for the deterioration of the town is irrelevant for the operation of section 139. And negotiating which functions and powers were to be taken from the Council would be futile, since it would be impossible to separate the areas where performance was satisfactory from those where it was not. Limiting the intervention to lifting the emergency was not advisable, as the aim of the intervention should be the *permanent* and *sustainable* ability of Butterworth to fulfil its obligations.

5.2.1 A comment on the directive

A few comments can be made here. First of all, the directive is right in stating that the only jurisdictional fact required by section 139 is the inability of the Council to fulfil its executive obligations. Blame is, to a very large extent, irrelevant in the operation of section 139. In the light of the circumstances that prevailed in Butterworth during February and March 1998, the province seemed to have good reason to find that it was impossible to draw a line between the functions of the Council that were being

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part of the debate in the NCOP of 20 April 1998.

performed satisfactorily and those that were not. But it must be noted that section 139(1)(b) clearly states that, if the intervention takes the form of the assumption of responsibility, it should be limited to the 'relevant' obligation and 'to the extent necessary'. This obliges the Provincial Executive to attempt to limit the assumption of responsibility to those functions and powers where the problem lies and not to use section 139(1)(b) in a sweeping way, relieving the relevant local authority of all its powers.

5.3 Steps to be taken

The directive continues with the steps that the MEC was considering to take against Butterworth.

- The councillors and the town clerk would be relieved from their respective functions and duties with retention of full benefits, and would be replaced by administrators appointed by the MEC.
- The councillors and the town clerk should be available to render assistance or provide information to the administrators.
- This position would endure until -
  - the Provincial Executive was satisfied that economic and financial order and stability, as well as the ability to render sustainable and effective local government services, had been established; and
  - the investigation of the Heath Commission, as well as any legal proceedings, connected to it, had ended.

5.4 Butterworth's response to the directive

The Council was given until 17 March, 15h00, to make written or oral representations with regard to the directive. A response was received in which the Council once again blamed political structures for the problems in Butterworth. It suggested that the history of poor administration in the area should be seen as extenuating circumstances. It further noted that the collection of arrears was being attended to and referred to the strike of municipal labourers as 'serious acts of sabotage' committed by 'criminal elements'. The water supply had been taken over by a private contractor and legal action had been taken to force the labourers back to work. In conclusion, the Council refused to step down.

5.5 Eastern Cape assumes responsibility for administration of Butterworth

This response did not convince the Provincial Executive not to intervene. On 18 March, the Eastern Cape Provincial Executive intervened as set out in the directive. The councillors were requested to comply with the provisions of the directive and to 'temporarily relinquish' their functions. Two administrators were appointed to administer the affairs of the municipality. On 11 May a third administrator was appointed.

5.5.1 A comment on the terms of the intervention

From the terms of the intervention, as set out in the directive, it seemed that the province misinterpreted section 139. The Provincial Executive 'relieved' the councillors 'from their functions and duties' on the basis of section 139. However, section 139 does not authorise a province to do so. The Constitution speaks of the non-fulfilment of an *executive* obligation. Section 139 is not concerned with the municipality's *legislative* authority, that is its authority to make by-laws. The effective dissolution of the Council meant that its *legislative* authority was being curtailed without a legal basis. In line with that, the councillors should not have been ordered to vacate their offices, but should have retained access to them, in order to be able to fulfil that legislative function. Another problem arises with regard to the duration of intervention. The province linked the duration to, *inter alia*, the duration of the investigation by the Heath Commission as well as the duration of all legal proceedings in connection with its findings. These seem to be a very uncertain criteria, considering that legal (appeal) proceedings can continue for a number of years and that the intervention must be limited to the extent necessary to maintain and meet minimum standards.

5.6 Approval by the Minister

On 27 March the Provincial Executive requested the Minister for Provincial Affairs and Constitutional Development to approve the intervention. On 1 April, just within the time period allowed by section 139(2)(a), the Minister approved unconditionally.

5.7 Approval by the NCOP

Approval of the National Council of Provinces was sought on 30 March. The NCOP discussed the intervention in a special plenary on 20 April, in which the intervention was approved by the Council. However, the NCOP did give terms with which the intervention had to comply. It empowered the administrators to assume *executive and functional* responsibility in the following areas:

1. Provision of basic services -
   - the restoration of services such as water and electricity supply, refuse removal etc; and
   - ensuring that the social, economic, commercial and industrial viability of Butterworth was no longer threatened.
2. Financial management -
   - collection of rates, fees, service charges and other moneys due and owing to it;
   - ensuring that the municipality meets its financial obligations; and
   - ensuring that the municipality is enabled to comply with the provisions relating to financial management in section 10(G) of the Local Government Transition Act.[71]
3. Administrative procedures -
   - ensuring compliance with policies and procedures for the use of assets of the municipality;
   - ensuring use of those assets for their lawful purpose only; and
   - ensuring that the municipality's affairs are conducted in an open, transparent, accountable and responsible manner.

With regard to the powers of the council, the NCOP stated: "The powers of the Council are limited to the extent that the Administrators have assumed the duties of the Municipality to maintain essential national standards or meet established minimum standards for the rendering of services." It was further decided that the Select Committee on Constitutional Affairs and Public Administration would concern itself with the procedures for the review of the intervention.

5.8 The NCOP reviews

The Select Committee undertook a study tour to Butterworth on 25 and 26 May 1998. The aim of the visit was to ascertain whether or not the NCOP's Terms of Intervention were being adhered to. It further aimed to find out whether the intervention should continue, what was being done to support and strengthen the capacity of the municipality in terms of section 154(1) of the Constitution and what was being done to address the root cause of the problems, namely the conflict between the community of Butterworth and the council. The representatives of the NCOP met with all the stakeholders; provincial legislature, community structures, unions, municipal administration, councillors, mayor, MEC and the administrators. Subsequently, it drafted a report and proposed recommendations, which were approved by the NCOP.

5.8.1 The Report

Firstly, the NCOP again made it clear that the administrators only had capacity to perform *executive* functions. They could not legislate. Any legislative acts, including the budget, had to be approved by the council. Councillors could not be prevented from using the facilities of the municipality that they required to perform their responsibilities. Secondly, the report clarified the relationship between the council and the administrators by saying that the administrators were accountable to the MEC, but that they had to ensure regular reporting to the council. Thirdly, vacancies that occurred had to be filled and those members entitled to allowances had to be paid those allowances. The MEC was to investigate allegations that members were receiving allowances in excess of the amount they were entitled to. Fourthly, the town clerk, who had been suspended, had to be re-instated. He was to work together with the administrators to resolve the problems. However, if the town clerk was unwilling or unable to do so, the MEC was to require the Council to take necessary steps to relieve him of his responsibilities. Fifthly, in dealing with the community, the administrators were encouraged to remain impartial at all times and to appear to act in an even-handed manner. In conclusion, the report stated that all stakeholders, including staff and the councillors, agreed that the intervention should continue.

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[71] Act 209 of 1993.

5.8.2 Comment on the report

The report provided clarity on a few problematic elements of the intervention and corrected some mistakes on the part of the province. The notion, created by the directive and the actual intervention by the province, that the councillors were to lay down their functions *altogether*, was corrected by the NCOP. The councillors retained their capacity to legislate. They could therefore not be refused access to facilities they wanted to use for that purpose. The NCOP also reversed the suspension of the town clerk. This implied that the NCOP was of the opinion that the council, and not the administrators, remained the designated organ to take disciplinary action against the town clerk. However, the report did not deal with the question of whether or not the jurisdictional facts leading to the intervention, namely the deterioration of basic services and management, were still prevalent. The aims of the visit required an investigation into these objective facts, but the report details that most of the visit was spent on addressing the lack of clarity surrounding the intervention and the conflict between the community and the council.

5.9 The finale: court action

On 3 July, the town clerk was suspended from his position by the MEC. The MEC also investigated the allegations of excesses in the payment of allowances to the councillors, and reset their allowances to the legal amount. The councillors and the mayor of Butterworth then embarked on legal action. On 14 August they approached the High Court in Umtata for an interdict. In their application, they asked for re-instatement of the town clerk, invalidation of the intervention (or continuation on the terms of the NCOP), re-instatement of the original payment of allowances to the councillors and the MEC and the administrators to be prevented from interfering with the council. After negotiations between the council, the Provincial Executive and the NCOP, the case was settled out of court. In terms of the agreement, the intervention was withdrawn and in its place the parties agreed to a new intervention, the terms of which were described in the agreement. The settlement contained the following terms:

- the town clerk had to be re-instated;
- any allegations of misconduct of the town clerk had to be dealt with by the council;

- the intervention had to be withdrawn and the administrators had to cease their activities in Butterworth;
- all expenditures incurred after the start of the intervention, which were not approved by the council, were acknowledged as being unauthorised;
- the Council had to review and approve those expenditures retrospectively - all expenditure not approved by the Council had to be repaid by the MEC;
- a new intervention had to be undertaken by the province, limited to -
    - directing and assisting the staff of the municipality to deliver services; and
    - providing resources and skills and build capacities in conjunction with municipal staff;
- the new intervention had to be approved by the NCOP and the province had to abide by and implement the terms of the approval, if granted;
- under the new intervention, the Council had to convene in the usual manner to exercise its legislative functions;
- one or more persons, nominated by SALGA and appointed by the MEC, had to direct and control the intervention; and
- the MEC had to appoint an administrator to administer and implement the terms of the agreement.

5.9.1 A comment on the agreement

The most interesting aspects of this agreement are the reinstatement of the town clerk and the provision regarding the expenditures made without approval of the council. The reinstatement of the town clerk, after his suspension by the MEC, affirms the position taken by the NCOP in its report that, despite the intervention, the council, and not the MEC, was the designated organ to take disciplinary action against the town clerk. The provision regarding the expenditures made without approval of the council, makes clear that the approval of expenditures falls within the ambit of the legislative capacity of the council. This legislative capacity remains intact in the event of an intervention. In conclusion, the section 139 intervention does not affect the legislative capacity of the relevant municipality and it does not go as far as assuming the council's authority to take disciplinary action against its employees. The agreement also refers to a new intervention, to take place after the withdrawal of the

original intervention. This new intervention never materialised. Apparently, the need for provincial interference was no longer there.

5.10 Assessment

In the end, the intervention seems to have accomplished its aims. Relative normality has returned to Butterworth, the delivery of services is at an acceptable level and there are no serious complaints by business or communities about the municipality. From a legal point of view, two important notions emerge from this unprecedented section 139 intervention. Firstly, the assumption of responsibility for a municipality's obligations by a province cannot effect the legislative capacity of that municipality. The status of local government as an autonomous sphere of government prevents the province from assuming a municipality's legislative capacity. Secondly, the role of the NCOP should be emphasised. The NCOP took its obligation to review this intervention very seriously. The NCOP's constitutionally mandated supervision works in two ways; not only must the NCOP assist the province in creating workable terms for the intervention as well as clarifying its role, but it must also protect local authorities from interventions that reach beyond that which is constitutionally permitted.

CHAPTER 6

THE DUTCH 'VERWAARLOZINGSREGELING'; A HORSE'S MEDICINE?

In the Netherlands, the answer to the failure of decentralised organs to perform is the 'verwaarlozingsregeling' (regulation in case of neglect). It is being used on only very rare occasions and one Dutch author referred to it as a 'paardemiddel', in other words, a very blunt and far reaching 'medicine' that you would only use for horses. Notwithstanding its impopularity and limited use, a comparison between the Dutch 'regulation in case of neglect' and section 139 of the South African Constitution is useful. In this chapter, the Dutch scheme will be briefly discussed and some comparisons with section 139 will be made.

6.1 Introduction: autonomy and co-operate powers

The powers of decentralised organs to regulate and administer in the Netherlands are twofold. There are 'autonomous powers' and 'powers in co-operative governance'.[72] Section 124(1) of the Dutch Constitution[73] describes the autonomous powers and stipulates that provinces and municipalities can regulate and administer their own 'household', their own affairs within their jurisdiction, autonomously. Section 124(2) deals with the powers in co-operative governance and stipulates that legislation can assign local and provincial government to regulate and administer other matters.

The biggest difference between the two forms of power is that in exercising their autonomous powers, the decentralised organs make their own 'political' decisions, whereas in exercising the powers in co-operative governance, the decentralised organs merely co-operate in realising the policies of other (higher) organs.[74]

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[72] This is a direct translation of the Dutch terms 'autonomie' and 'medebewind'. The term co-operative governance should not be confused with the South African principles of co-operative governance.

[73] 'Grondwet voor het Koninkrijk der Nederlanden', as amended by the Acts of 10 July 1995, Stb. 401, 402, 403 and 404.

[74] See C A J M Kortmann, 'Constitutioneel Recht', 1990 at pg. 120. An example of an autonomous power is the power of a municipality to legislate on and administer household waste disposal and

There is a clear similarity between the concept of 'autonomous' power in Dutch law and the South African concept of local government as an autonomous sphere of government with,

> "...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."[75]

6.2 The 'verwaarlozingsregeling' (regulation in case of neglect)

The 'regulation in case of neglect' scheme has its foundation in section 132(5) of the Dutch Constitution -

> "The law regulates the provisions in case of failure with regard to the regulation and administration, asked for in section 124(2). In legislation, provision can be made, irrespective of sections 125 and 127, for the event where the administration of a province or municipality grossly neglects its tasks."[76]

The regulation in case of neglect follows the two tiered system of decentralised powers, alluded to above. The first part of section 132(5) deals with the failure to fulfil obligations in co-operative governance. In that case, provision for an intervention should be made in legislation. That legislation can be general legislation, that deals with decentralisation (so called 'organic' legislation), such as the Local Government Act[77] or the Provincial Government Act[78] or it can be the statute, in which is called for co-operation by local or provincial government, such as, for example, the Passport Act.[79] The second part of section 132(5) deals with the 'gross neglect' of autonomous powers. In that case, a special law has to be enacted, that establishes the gross neglect within the province or municipality and describes the necessary measures. The requirement that the neglect must be 'gross', together with

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example of a power in co-operative governance is the issuing of passports by the municipality in terms of the Passport Act.

[75] See section 151(3) of the South African Constitution.

[76] Translation of: "De wet regelt de voorzieningen bij in gebreke blijven ten aanzien van regeling en bestuur, gevorderd krachtens artikel 124, tweede lid. Bij de wet kunnen met afwijking van de artikelen 125 en 127 voorzieningen worden getroffen voor het geval het bestuur van een provincie of een gemeente zijn taken grovelijk verwaarloost."

[77] 'Gemeentewet', Stb.1993/611

[78] 'Provinciewet', Stb. 1993/399

[79] In which case that statute will be regarded as a *lex specialis* and will derogate from 'organic' laws like the Local Government Act and the Provincial Government Act.

the barrier of an *ad hoc* statute, emphasises the respect for the autonomy of local government in exercising those powers. There seems to be no scope for intervention in the event of neglect of autonomous powers that is not 'gross'.[80]

6.3 Failure to exercise powers in co-operative governance

The Local Government Act regulates the intervention, referred to in the first part of section 132(5) of the Constitution. Section 123 of the Local Government Act stipulates that the local executive council[81] takes the decision, required by legislation, if the Municipal Council fails to do so (properly). If the mayor or the local executive councils fails to perform, the provincial executive[82] or the governor[83] steps in and takes the required decision. In general, the intervening organ cannot step in, before allowing the primary responsible organ to take the necessary decision within a certain time. The primary responsible organ should thus be given a 'second chance'.[84]
Important to note is that this intervention by the province takes place *in the name of the municipal administration*,[85] so that the municipality is liable for these actions. Moreover, the provincial intervention takes place *at the expense of the municipality*.[86]

Under what circumstances is there a failure to exercise these powers in co-operative governance? The terminology in both the Constitution and the Local Government Act is amorphous and vague[87] but can be understood as meaning: implementation that is not in accordance with the text and meaning of the statute that requires the implementation by local or provincial government. It is clear that a difference in approach or a disagreement on the implementation of the policy does not merit an intervention.[88]

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[80] See E Brederveld, 'Gemeenterecht', Deventer 1998 at pg. 215.
[81] In Dutch, 'Burgemeester en Wethouders', consisting of the mayor and executive members of the Municipal Council.
[82] In Dutch, 'Gedeputeerde Staten'.
[83] In Dutch, 'Commissaris der Koningin'.
[84] See Hennekens, Van Geest en Fernhout, 'Decentralisatie', Nijmegen 1998, at pg. 146.
[85] The provincial executive, however, remains responsible and accountable to the provincial legislature for the exercise of this power, see C J N Versteden en T Renes, 'Provincierecht', Zwolle 1994 at pg. 130.
[86] See Brederveld, *supra* n9, at pg. 217.
[87] The Constitution speaks of 'failure' ('in gebreke blijven') and the Local Government Act of 'not properly' ('niet naar behoren').
[88] See Versteden *et al supra* n14 at pg. 130.

6.4 Comparison

It is hard to judge whether there are similarities between the intervention in the exercise of co-operative powers and section 139 of the South African Constitution, because the form and exercise of the intervention is dependent on how it is regulated in the different statutes that require 'co-operation'. However, the concept of 'taking over of competence to take the required decision' as it is laid down in the organic legislation (the Local Government Act and the Provincial Government Act) is very similar to the 'assumption of responsibility' of section 139(1)(b) of the South African Constitution. Interesting is that a province that intervenes in a municipality does so in the name of, and at the expense of, the municipality. The two tiered system of intervention has one clear advantage. Most of the service-delivery powers fall under the co-operate powers and, to a certain extent, what is expected of the municipality will be described in legislation. This clearly limits the discretion of the intervening organ to decide when to intervene.

Another positive point of the intervention in the exercise of co-operate powers is the obligation on the intervening organ to allow the primary responsible organ a last chance to take the required decision. A line can be drawn to the requirement of prior notice in the context of a section 139 intervention.[89]

6.5 Failure to exercise autonomous powers

If a province or municipality grossly neglects its duty to regulate and administer its own 'household', *national* government can intervene by means of an *ad hoc* statute. That means that the national executive and parliament have to concern themselves with the question whether gross neglect is present and what intervention is necessary and appropriate. Although this power was never used with regard to a province, a few interventions in municipalities have taken place.[90]

There is no legislation to explain how national government should use this power or what kind of intervention is appropriate. Therefore, national government is free to

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[89] See Chapter 3, Part I

[90] Such interventions took place in 1895 in Opsterland and Weststellingwerf (Acts of 2 February 1895, Stb. 15 and 16), in 1933 in Beerta (Act of 29 December 1933, Stb. G 770), in 1946 again in Opsterland (Act of 23 November 1946, Stb. 327) and in 1951 in Finsterwolde (Act of 20 July 1951, Stb. 308).

choose any form of intervention. But the most logical and often used option is the appointment of a 'governmentscommissioner', who is to restore the situation in the municipality.[91]

'Gross neglect' means the intolerable neglect of tasks, assigned to local and provincial government in organic legislation, namely the Local Government Act and the Provincial Government Act.[92] Where a municipality fails to appoint a town clerk or representatives in the provincial legislation or fails to pass a budget (tasks, which are required by organic legislation), there is 'gross neglect' and an intervention is possible. But also the serious failure to regulate and administer the municipal 'household' in the public interest will amount to 'gross neglect', because organic legislation assigns decentralised organs to regulate and administer their 'household' in the public interest. It seems that the failure to fulfil one, single part of that task does not merit an intervention, but that a more general, overall failure is required.[93]

6.6 Comparison

There is similarity between the 'gross neglect' intervention in the exercise of autonomous powers and section 139 of the South African Constitution. Both interventions are ultimate remedies. The discretion as to when and how to intervene is substantial. And the assumption of responsibility by a special agent ('governmentscommissioner' or 'administrator') is mostly used. However, there are a few important differences.

First of all, the autonomy of local government in South Africa has a wider scope than the autonomous powers of local government in the Netherlands, where most of the 'service delivery' powers fall under the co-operate powers. Their intervention would therefore be regulated in general legislation (see above).

Secondly, the 'gross neglect' intervention can only be exercised by national government, not by a province (in the case of failure by a municipality) and can only

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[91] See Hennekens *et al supra* n13 at pg. 144
[92] See Hennekens *et al supra* n13 at pg. 144.
[93] See Brederveld *supra* n9 at pg. 196.

exist in the form of special *ad* hoc legislation, not in the form of a decision, taken by the national executive only.

6.7 Conclusion

The use of powers in terms of section 132(5) of the Dutch Constitution takes place only very rarely. Dutch authors applaud that, because they hold that the use of section 132(5) powers does not serve the concept of decentralisation.[94] Although there is very little experience with the interventions, a few conclusions can be drawn. With regard to the autonomous powers, the same criticism as in South Africa could prevail: the discretion to decide under which circumstances intervention is justified is unfettered. However, in the Dutch context, the intervention takes place in the form of a statute, enacted by Parliament. This takes away most of the objections against the discretion.

When one compares the two schemes of intervention, the conclusion must be that it is not easy to decide which constitution is more 'federal' or more 'decentralised'. The South African concept of an autonomous sphere of local government does not necessarily mean that local government is an 'equal partner in government'. On the one hand, the autonomy of local government in South Africa has a wider scope than the autonomy of local government in the Netherlands. On the other hand, the rules and conditions for intervention in the Netherlands are stricter than in South Africa. To what extent section 139 will make an inroad into the much hailed concept of an autonomous sphere of local government will depend on the legislation that is going to give body and flesh to it. But the comparison with the Dutch scheme of intervention indicates that the degree of 'real' autonomy, afforded to local government does not depend solely on the introduction of a unique and hailed constitutional principle of autonomy but also on the degree to which exceptions to, and inroads into, that principle are permitted.

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[94] See Hennekens *et al supra* n13 at pg. 148.

CHAPTER 7

CONCLUSION

Provincial government can intervene if a municipality fails to perform an executive obligation. That is the basis of section 139. The distinction between *executive* and *legislative* obligations of local government is vital. The fact that the intervention can only be concerned with *executive* obligations has an important bearing on the powers that the province can afford itself after the intervention. That is the reason why the Municipal Structures Act is moving on thin ice. The power of the MEC to disband the Municipal Council after an unsuccessful section 139 intervention is a grave inroad into the autonomy of local government. The Constitutional Court referred to the Municipal Council as a "deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself".[95] But this legislative assembly can now be sent home by the provincial administration.

The executive obligation that is not being fulfilled has to be contained in a statutory provision. The question *which* obligation is not being fulfilled has a bearing on *what* powers the province should have. The more reason to argue that the obligation has to be identifiable.

There is a need for the requirements for intervention to be objectified. Terms such as 'essential national standards' and 'minimum requirements' need to be clarified in legislation in order to make section 139 a manageable tool. The requirements for intervention and the powers of the province need to be linked together. The *extent* of the intervention, that is the duration of it and the extent of the powers of the province, should be inextricably linked to the *purpose* of the intervention. The extent of the intervention should be determined on the basis of the need to restore the fulfilment of the obligation, not on the basis of the province's higher position in the governmental hierarchy or on a desire to 'punish' the municipality for not performing. So once it becomes clear what those 'minimum' and 'essential' standards are, it also becomes

[95] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) at paragraph 26.

easier to determine what the powers of the province are in circumstances where those standards are not being met.

It has been argued that provincial support for local government is not a precondition for a section 139 intervention. It is not sensible to allow a municipality to deteriorate further, only because the province failed to provide support and therefore forfeited its right to intervene.

Prior notice is a precondition for any section 139 intervention. This requirement can be based on common law and on the principles of co-operative government. Furthermore, on the basis of the principles of co-operative government it can be concluded that the assumption of responsibility in terms of section 139(1)(b) cannot take place without the issuing of a directive in terms of section 139(1)(a). In other words, section 139(1)(a) is a requirement for section 139(1)(b).

The NCOP plays an important role in the section 139(1)(b) intervention. The fact that the NCOP must monitor and supervise the intervention and that it can end the intervention means that the way in which it uses this power will set precedents and determine to a large extent the course that section 139 will follow.

It has been submitted that the administrators, who actually 'perform' the section 139(1)(b) intervention, retain their position in the provincial hierarchy. They act in the name of the province.[96] In principle, the province bears the financial burden of the intervention, except in circumstances where that would be unreasonable. The NCOP could be the organ to decide where that would be the case.

A comparison with the Dutch scheme of intervention indicates that, although the Dutch do not embrace the concept of an 'autonomous sphere of local government' the way South Africa does, their 'verwaarlozingsregeling' seems to afford local government more autonomy than section 139 does. This remarkable outcome is

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[96] The position in the Netherlands is different. There, the 'overheidscommissaris' acts in the name of the municipality.

exacerbated by the newly created power of the MEC to disband a Municipal Council after an unsuccessful intervention.

In conclusion, what becomes abundantly clear from the complexities surrounding the section 139 intervention, is that the legislation, envisaged by section 139(3) is dire necessity.

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