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ASSIGNMENTS OF POWERS TO LOCAL GOVERNMENT

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

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1 INTRODUCTION

When the new premier of the Western Cape took office in January 2002, he vowed to "devolve[e] as many provincial functions as possible onto local authorities which have the capacity to perform them".[1]

This comment was borne out of the realisation, according to the Premier, that poverty must be fought at local level. This stance is in line with the commitment to building a strong local government sphere where delivery on the promise of development must take place. However, a critical question in terms of devolving powers to local government is: how does devolution take place? What is the legal framework in terms of the new dispensation for local government? This is an area of local government law that has remained largely unexplored to date.

1.1 Why is assignment important?

A critical principle that must be imbedded in an institutional framework that envisages 'developmental local government' is a sufficient degree of local government autonomy. This autonomy is not enhanced with the mere devolution of responsibility. On the contrary, local government autonomy is compromised in a very pervasive manner if responsibilities are loaded on municipalities without the concomitant resources. Internationally, one of the biggest problems that subnational units in decentralised states experience is the dreaded 'unfunded mandate'.[2]

Another important prerequisite for successful decentralisation that facilitates development driven at local level is the clear allocation of responsibilities between national, provincial and local governments.[3] Uncertainty over who does what often leads to inadequate governance and will stifle the development mandate of local government. Clarity over assignments, the procedures, their content and impact is therefore of paramount importance.

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[1] 'Highs and lows of Peter Marais' *Business Day* (18 January 2002).
[2] Rondinelli D, Nellis J and Cheema G *Decentralization in developing countries: a review of recent experience* Worldbank research working paper 1983 at p 49.
[3] See also *Grootboom and others v Oostenberg Municipality and others* 2000 (3) BCLR 277 at para 40.

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This article examines the legal framework for assignment of powers to local government. The background will be the commitment to a strong, developmental local government and the required degree of autonomy to realise this mandate.

2 SOURCES OF POWER FOR LOCAL GOVERNMENT

Local government has two sources power, the so-called 'original' powers and 'assigned' powers.

Original powers

Section 156(1)(a) of the Constitution provides that a municipality has executive authority in respect of, and has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 to the Constitution. This is the primary source of power for local government. Municipalities derive these powers from the Constitution itself. The obvious significance of this lies in the fact that they cannot be removed or amended by ordinary statutes or provincial acts. These functions cannot be changed but for an amendment to the Constitution itself. Moreover, national and provincial governments' regulatory power over Schedule 4B and Schedule 5B matters is limited.[4] These two elements constitute the most fundamental features of local government's institutional integrity.

Assigned powers

The secondary source of power for local government is assignment. Section 156(1)(b) provides that a municipality has executive authority in respect of, and has the right to administer any other matter assigned to it by national or provincial legislation. Assignment can take the form of general assignments or assignments to individual municipalities. It is this second source of power for local government that is the topic of this article.

2 ASSIGNMENT: THE CONSTITUTIONAL PROVISIONS

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

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A closer examination of the provisions in the Constitution on assignment to local government produces three categories of assignment. The distinction between the three categories is important. It determines the applicable legal framework.

2.1 General assignment of legislative and executive powers

Section 156(1)(b), the general provision on assignment, is the basis for national or provincial legislatures to assign matters to local government by legislation. This means that a national Act of Parliament would assign a matter, that falls outside of Schedule 4B or Schedule 5B to the entire local government sphere. An example could be an Act that stipulates that 'low cost housing' (part of the 4A competency 'Housing') is assigned to local government. This would mean that municipalities are afforded the power to administer and regulate 'low cost housing' as a competency of their own. A provincial legislature can do the same and assign a matter to the local government sphere in the province. This would result in all municipalities in that province having the power to administer and regulate that particular issue. The assignment of legislative power does not mean that there is an *obligation* on each municipality to adopt by-laws on the topic. Municipalities are part of a 'distinctive' sphere of government and have their own legislative assembly.[5] However, the scope of the legislative power can be circumscribed in the provincial or national act. The assignment does not have to be a blanket transfer: national or provincial government can circumscribe the legislative power in the assignment act.

2.2 Individual assignments of legislative power

In terms of section 44(1)(a)(iii) and 104(1)(c) of the Constitution, national or provincial legislatures can assign legislative power to *specific* municipal councils.[6] This means that a national Act of Parliament would assign legislative power over a particular issue to an individual municipal council. For example the national government could assign the power to regulate 'Animal control' (a Schedule 4A matter) to Mogale City municipality, which would give that municipality to right to regulate those matters within its area of jurisdiction. Provincial legislatures could do the same. For example, the Western Cape Provincial

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[5] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) at para 26; see also N Steytler and J de Visser 'Constitutional Court affirms status of local government' in 1999 *Local Government Law Bulletin* 1 at p 6.

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

legislature could assign the legislative power over 'Libraries' (a Schedule 5B matter) to the City of Cape Town, which would give that municipality the right to regulate libraries in its area of jurisdiction. Importantly, this refers to an assignment of a legislative *power*. A legislative power is discretionary. The municipality 'on the receiving end' of the assignment cannot be compelled to legislate. However, the scope of the legislative power can be circumscribed in the provincial or national act.

2.3 Individual assignments of executive power

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

Firstly, it concerns *executive* powers only and no legislative powers.

Secondly, it entails a compulsion: the relevant sections speak of the assignment of a matter 'that is to be exercised'. It presupposes an obligation in terms of legislation on the relevant provincial or national executive to fulfil a particular function. In other words, an Act of Parliament tasks the relevant Minister with an obligation, which is then assigned to a municipality. Therefore, whereas the assignment of legislative power allocates *discretionary* powers, the assignment of executive power allocates a *duty* to do something. This explains the rationale behind the fact that it must be concluded by means of an agreement. The assignment must be consistent with the relevant Act of Parliament in terms of which the power exists. The act must provide for (or at least not prohibit) the assignment to municipalities.

2.4 Subsidiarity

Section 156(4) of the Constitution adds a significant dimension to the issue around assignments. It entrenches the principle of subsidiarity, which says that responsibilities should be allocated to the lowest level of government possible. Section 156(4) makes assignment by agreement of the administration of a Schedule 4A or 5A matter to a municipality by national and provincial government compulsory if –

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

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It is not immediately clear whether this type of assignment is an assignment of executive powers only or also of legislative powers. The agreement would assign 'the administration of a matter'. Then again, section 156(2) affords the municipality legislative authority over matters 'which it has the right to administer'. Does this mean that the municipality can make by-laws on matters that were assigned in terms of section 156(2)? The text and context of the section suggests otherwise. The assignment must be effected 'by agreement and subject to any conditions'. A legislative power cannot be transferred from one sphere of government to another by the mere operation of an agreement. It is only in terms of section 44(1)(a)(iii) or 104(1)(c) of the Constitution that legislative power can be assigned to an individual municipality. A combination of section 156(4) and these sections is, however, possible.

3 ASSIGNMENT: THE PROVISIONS IN THE SYSTEMS ACT

The legal regime for assignment of matters to local government is further regulated in Chapter 3 of the Municipal Systems Act, which render assignments subject to certain requirements. In section 9 and 10, the Act distinguishes between assignments to municipalities generally and assignments to specific municipalities.[7]

3.1 General assignments by legislation

The Systems Act provides for a number of requirements to general assignments by legislation. Prior to the introduction of the Bill in Parliament, the relevant member of Cabinet (or Deputy Minister) must –

- consult with the Minister, responsible for local government, the Minister of Finance and organised local government (national); and
- request an assessment from the Financial and Fiscal Commission of the financial implications of the legislation and consider that assessment. [8]

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

[8] S 9(1).

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The Bill must be published in the manner that is prescribed in section 154(2) of the Constitution. This means that the Bill must be published for public comment in a manner that allows organised local government, municipalities and other interested parties to make representations. Further, the (Deputy) Minister, initiating the assignment must assess:

- whether or not the assignment imposes a duty of the municipalities concerned. If the assignment concerns only a legislative power there will be no duty: a legislative power is discretionary: there is no compulsion to legislate;
- whether the duty falls outside Schedule 4B and 5B (and is not incidental to any of those areas); and
- whether the performance of the duty has financial implications for the municipalities concerned. [9]

If the answer to these three question is positive, the (Deputy) Minister must 'take appropriate steps to ensure sufficient funding, and capacity building initiatives as may needed, for the performance of the assigned function or power by the municipalities concerned'. [10]

The above also applies to the general assignment by a province to the municipalities in that province. The MEC who initiates the assignment must follow the same route, subject to the proviso that the consultation must take place with the provincial ministers for local government and finance and with organised local government in the province. [11]

3.2 Individual assignment of legislative powers

A national Minister initiating the assignment by way of national legislation must consult the Minister, responsible for local government before introducing the Bill in Parliament. [12] An MEC initiating the assignment by way of provincial legislation must consult the MEC for

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

[10] S 9(3).

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

[12] S 10(1).

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local government in the province, before introducing the Bill. The Minister or MEC, initiating the assignment must assess whether or not it imposes a duty, whether or not the duty falls outside Schedule 4B and 5B (and is not incidental to any of those areas) and whether there are financial implications for the municipalities concerned. The Minister or MEC must take appropriate steps to ensure sufficient funding and capacity building initiatives if the answer to those questions is positive.[13]

The assignment of a legislative power cannot impose a duty, since it is discretionary. Therefore, the steps to ensure funding and capacity building would normally not come into play.

3.3 Individual assignment of executive powers

The Cabinet member initiating the assignment by way of an agreement must consult the Minister responsible for local government before concluding the agreement.[14] If the assignment imposes a duty, with financial implications, which falls outside of Schedule 4B and Schedule 5B the national Cabinet member must take appropriate steps to ensure funding and capacity building. [15] The same conditions apply for provincial Cabinet members initiating the assignment: there must be an agreement and the assignment must be consistent with the relevant Act. The provincial Cabinet member initiating the assignment by way of an agreement must consult the national Minister, responsible for local government before concluding the agreement. [16] At first sight, the requirement in section 10(2)(b) seems strange compared to the logic of sections 9 and 10: why would the MEC have to consult with the national Minister before assigning by agreement when he or she has to consult with the provincial MEC for local government before assigning by legislation. The rationale must lie in the absence of the checks and balances associated with the legislative process. This necessitates consultation with a 'higher' organ in the instance of assignment by agreement, which is an executive act. If the assignment imposes a duty, with financial implications,

[13] S 10(3).
[14] S 10(1)(b).
[15] S 10(3).
[16] S 10(2).

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which falls outside of Schedule 4B and Schedule 5B the provincial Cabinet member must take appropriate steps to ensure funding and capacity building. [17]

One might ask the question what the relevance is of the obligation on the MEC or the Minister to ensure funding and capacity building if the municipality must, in any event, agree to the assignment. It is expected that a municipality would not agree to the assignment of a duty, unless it is convinced that these measures have been taken. However, against the backdrop of the commitment to a strong developmental local government that comprises of municipalities that are mature partners of provincial and local government the obligation appears necessary. The specific statutory obligation is a necessary protection for a municipality's autonomy and will strengthen municipalities in their negotiations with other spheres of government around the assignment of duties.

4 IMPLEMENTATION

A protection against unfunded mandates has been built into the legal framework for local government. This is a novel and important feature of the new institutional scheme for municipalities. However, it is early days to speculate on the effectiveness of this protection. The value of the provisions will, to a large extent, depend on the stakeholders' commitment to effective local government.

4.1 Developmental local government: preventing unfunded mandates

The rationale behind the procedures and requirements in sections 9 and 10 of the Systems Act appears to be the 'protection' of local government. Local government is 'protected' against the assignment of responsibilities without ensuring that the concomitant resources are allocated and that there are initiatives to build capacity at local level to perform the assigned tasks. The inclusion of these requirements is important, considering that the issue of unfunded mandates is one of the major gripes in the debates around decentralisation. The Systems Act has taken note of the worldwide complaint of subnational organs that they are tasked to perform functions without the necessary resources or capacity. However, the requirements must be examined more closely to assess their capacity to protect against

[17] S 10(3).

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unfunded mandates. The requirements can be broken up in procedural and substantial requirements.

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

- the degree to which the organ of state that initiates the assignment takes serious the consultation and the arguments proffered by the agencies that are to be consulted. For example, how much time will be allowed for preparing input, at what stage of the preparation process are the various agencies involved, do they have real input or will they be faced with faitês accompli?
- the degree to which consulted agencies are able and willing to bring forward coherent and convincing arguments, protecting local government against unfunded mandates and the degree to which they in fact have that agenda. Organised local government will certainly have the protection against unfunded mandates high on its agenda. However its capacity to advocate local government's interest in assignment issues is still an uncertain variable. [18]

The *substantial requirements* relate to the 'appropriate steps' that the MEC or the Minister must take to ensure sufficient funding and capacity building initiatives at local level to perform the assigned function. This appears to be a stronger and more direct protection against unfunded mandates. The protection is phrased in a mandatory wording. National and provincial executives can be taken to task when these provisions are not adhered to. It is an implementation of the provisions in the Constitution that instruct provincial and local government to support the capacity of local government.[19] The substantial requirements relate to finances and capacity building initiatives. Could a local government challenge an assignment in court on the basis that these requirements are not met? Could a court, for

[18] 'Salga decides on critical look at itself' *Business Day* (12 June 2001).
[19] Ss 154(1) and 155(6) of the Constitution.

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example, hear arguments around the funds that are generally needed to perform the function compared to the actual funds allocated to local government to perform the function and the manner in which the allocation was calculated? Sections 9 and 10 instruct the MEC or Minister to 'take appropriate steps' to ensure sufficient funding and capacity building initiatives. The requirement does not relate to 'outcome' (namely the presence of sufficient funds or capacity) but to 'input' (appropriate steps to ensure sufficient funding and initiatives to build capacity). The executive would have discharged the duty by making sure that there is 'input', without necessarily having to prove that the input has yielded success. A court cannot 'review' the allocation, since it constitutes an appropriation of government funds, which is a task reserved for legislatures.[20] The principle of separation of powers prevents a court from reviewing budget allocations. A court's assessment can only be very limited and can basically only test whether or not the executive could, in all reasonableness, have come to the relevant allocation.

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

4.2 Explicit assignment

One of the critical problems that make this intricate scheme difficult to implement and monitor is the fact that assignments are currently not explicitly formulated as such. Whether or not powers or functions are in fact being assigned is thus a matter of legislative interpretation and deduction. This renders the division of responsibilities between spheres of government unpredictable and unclear.

Assignment should be explicitly formulated in the legislation as such. If not, the protection afforded by sections 9 and 10 of the Systems Act will have a hollow ring to it, in that it would be unclear from the beginning whether the provisions apply or not.

[20] *Fedsure* at para 44.

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For example, when the Law Commission formulated proposals to review the Child Care Act,[21] it proposed, amongst other things, to oblige local government in terms of a new children's statute to

> "keep a register of the total number of children and record their ages, in its area of jurisdiction."[22]

The obligation on local government to keep this kind of register falls outside of its original power to regulate and administer 'child care facilities'.[23] An assignment would be necessary. The Law Commission's proposal does not refer to or acknowledge the need for an assignment. Local government might be the most appropriate sphere of government to perform such a function. However, the imposition of such a duty on local government would have enormous administrative and financial implications. The mere formulation in national legislation of such a duty on local government is unconstitutional and not in keeping with the system of intergovernmental relations. Since it would concern an assignment of a specific duty and not the assignment of legislative power, it would have to be done in terms of section 99 or 126 of the Constitution. This means that it would have to be preceded by an obligation on the relevant ministry to perform that task. Subsequently, the Minister would have to assign in terms of sections 99 or 126 *to specific municipalities*, subject to agreement and the requirements of section 10 of the Systems Act.

The application of these sections should not depend on a municipality challenging an assignment in court or elsewhere. Rather, it should be an integral element of the system of intergovernmental relations, which includes respect for institutional integrity and prior consultation over measures that stand to affect local government.

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[21] Act 74 of 1983;

[22] Law Commission, *Review of the Child Care* Act, Discussion Paper 103 (Project 110) at paragraph 9.7.4 available at www.law.wits.ac.za.

[23] Schedule 4B of the Constitution.

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4.3 Interface between subsidiarity and section 10 of the Systems Act

If a particular matter *must* be assigned because the requirements of the subsidiarity principle of section 156(4) are met, what is then the role of section 10 of the Systems Act? Should that procedure still be followed?

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

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

5 CONCLUSION

Importantly, when national and provincial governments decide to assign powers and functions to local government, this must be done explicitly, using the appropriate basis in the Constitution and following the procedures in the Systems Act. This will enhance the clarity on the allocation of powers over the various spheres and will allow for the emergence of practical solutions to some of the abovementioned implementation difficulties. More importantly, it will afford municipalities the necessary protection against unfunded mandates.