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## **THE INSTITUTIONAL FRAMEWORK FOR DEVELOPMENTAL LOCAL GOVERNMENT: MAKING GOOD ON THE PROMISE OF DEVELOPMENT?**

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## **Background**

With the introduction of the 1997 Constitution and the White Paper on Local Government, it has become clear that local government is to play a pivotal, if not decisive role in development in South Africa. The White Paper introduced 'developmental local government' and the accompanying onus, placed on local authorities to become 'developmentally orientated' in all their activities. The main rationale behind its introduction was the need for a new generation of local governments whose mandates of being 'retailers' of municipal services would be extended with the mandate to develop their areas of jurisdiction. Local government was to become a strategic, mission-driven exercise.

It is therefore necessary to ask the following two questions:

1. *Which institutional principles are critical for decentralisation to local government to be successful in facilitating development?*

This paper attempts to formulate principles for decentralisation to local government that must be entrenched in an institutional framework for it to be successful in facilitating development. They are formulated on the basis of an examination of international literature on decentralised development with a specific emphasis on the African continent.

2. *To what extent are these principles present in the South African institutional framework for 'developmental local government'?*

The formulation of these principles then enables the review of the local government dispensation, as laid down in the Constitution, legislation and policy for the existence and implementation of these principles. This exercise should result in an answer to the question as to whether or not the institutional framework of local government in South Africa makes good on the promise of developmental local government in the Constitution and the White Paper. In this paper, the institutional framework will be tested against one of the institutional principles, namely the principle of local government autonomy.

## **1 Defining development**

For the purposes of engaging with the legal content of developmental local government, it is critical to come to a proper understanding of the term ‘development’. Some of the elements that make up the definition of development are explored in this section.

### ***1.1 Material element***

The most straightforward and recognisable element of a definition of development is the satisfaction of material needs: the improvement of a standard of living and the reduction of absolute poverty.<sup>1</sup> This could be referred to as the ‘material’ element of the definition: it relates to the improvement of the material well-being of people. A sole focus on the desire to improve the material well-being of people has led to a misguided concept of development, which is referred to as ‘developmentalism’: in terms of this approach, development is initiated by someone or some entity outside the realm of the lives of the people who are ‘in need of development’ and ‘development’ is a top-down approach, almost ‘inflicted’ on those that are to be developed. The missing link between a narrow intervention from the outside which improves certain aspects of people’s lives and true development is empowerment: placing people in a position to make choices and determine outcomes independently.<sup>2</sup>

Development brings freedom, provided it is development of people. But people cannot be developed; they can only develop themselves ... A man develops himself by joining in free discussion of a new venture and participating in the subsequent decision, he is not being developed if he is herded like an animal into a new venture.<sup>3</sup>

### ***1.2 Dignity: development initiated and carried by the people themselves***

The South African Constitution<sup>4</sup> states in section 10 that ‘[E]veryone has inherent dignity...’. A narrow definition of development that misses the empowerment element militates against a person’s dignity. Development must be initiated and sustained by the people themselves. For the people to

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<sup>1</sup>Mastenbroek and Steytler *Local government and development* 234.

<sup>2</sup>Scheepers *Guide to development* 6.

<sup>3</sup>Julius Nyerere, quoted in: Nengwkhulu *Local government in Botswana* 22.

<sup>4</sup>Constitution of the Republic of South Africa 108 of 1996.

sustain development, they need to be equipped with choices and possibilities.<sup>5</sup>

Therefore, the second element of the definition of development is ‘choice’, emanating from everyone’s inherent dignity: every person should have the ability and opportunity to make choices about their well-being.

### ***1.3 Equity***

Development cannot be achieved by means of economic growth alone. The argument that growth brings jobs, which expands the tax base, which then pays for service delivery misses the inevitability of the skewed distribution of life chances.<sup>6</sup> Therefore, a definition of development that encapsulates the notion that economic growth promotes the well-being of people must contain the element of equity. This element of equity can be subdivided in inter-social equity (redistribution) and inter-generational equity (sustainable development).

### ***1.4 Conclusion***

In conclusion, the definition of development that will guide the formulation of the institutional principles for ‘developmental decentralisation’ comprises of three elements, namely the improvement of material well-being, the empowerment with choice and inter-social and inter-generational equity in the delivery of development.

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<sup>5</sup> Turok *Beyond the miracle* 9. The RDP of the ANC says “[d]evelopment is not about the delivery of goods to a passive citizenry. It is about active involvement and growing empowerment.” *The Reconstruction and Development Programme* 5; see also Mastenbroek and Steytler *Local government and development* 234.

<sup>6</sup> McCartney *Disjunctures* 13.

## **2 The development predicament in Africa**

A comparison between the goals, inherent in the definition of development and the situation on the African continent bares a glaring ‘underperformance’ on those goals. Many African countries are facing grinding poverty, civil wars, authoritarian and undemocratic regimes, gaping income inequality and serious threats to the environment. There are peculiar characteristics of African states and of the African continent as a whole that seriously thwart its development efforts.<sup>7</sup>

### ***2.1 Slave trade***

The economic and developmental impact of the trans-Atlantic slave trade continues to hinder Africa’s development.<sup>8</sup> Kinship behaviour, which dominates African politics and society, emerged as a social structure in the slave trade era where the continent was violently ravaged and destroyed of its social fabric. In the absence of a state structure to protect them against the invaders, people resorted to kinship.<sup>9</sup> Further, the slave trade prevented the emergence of feudalism in Africa and thereby deprived it of this fertile ground for the growth of sound relations between governors and the governed and the emergence of the notion of ‘citizenship’.<sup>10</sup>

### ***2.2 Colonialism***

The colonist state had two main features: it was inherent suppressive and inherent centralist in nature.<sup>11</sup> Governance by the state was based on the interests of a small minority of people and on the exploitation of the remaining majority. Any form of dissent was brutally silenced. The state structure was in no way linked to the needs or interests of people. A strong authoritarian state structure, directed from the centre, was needed to maintain the exploitative system. After the colonial powers had left, the African state inherited a state structure, which was European, not African. The state was set up against African societies rather than having evolved out of the relationships of groups and individuals in societies.<sup>12</sup>

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<sup>7</sup> For the purposes of this chapter, the discussion is limited to Africa minus the Arab north.

<sup>8</sup> Bgoya and Hyden *State and crisis in Africa* 11.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid*; Burkens *Democratistische rechtsstaat* 10.

<sup>11</sup> Shah *Lessons about decentralisation* 10-11.

<sup>12</sup> Bgoya and Hyden *State and crisis in Africa*; Englebert *Contemporary African state* 767.

“Colonialism denied Africans the opportunity to be innovative and imaginative, and the opportunity to err.”<sup>13</sup>

### ***2.3 Failure of the post-colonial state***

The exploitation by the West of the African continent is one of the causes of Africa’s underdevelopment. However, it is too often used as an apology for the inability of post-colonial governments to create strong and responsive states. Virtually all post-colonial African states adopted centralist models of governance. Despite the efforts of post-colonial leadership to create a strong state, African states remained soft and weak. They failed to create fiscal capability, responsiveness, effectiveness or an ability to mobilise the economy.<sup>14</sup> Olowu attributes the failure of the centralised strategy to, amongst other things, its neglect and repression of the informal economic and social sector: the state assumed that the formal sector of politics and economy could bring about progress without the backing of community based institutions.<sup>15</sup> Secondly, by its expansion and its unbridled assumption of responsibility for all and sundry, the centralised state signed its own death warrant. The bureaucracy by far outgrew its competence and the state became an unmanageable ‘giant with clay feet’.<sup>16</sup> Further, single-party regimes and military dictatorships, which deemed to be solutions to the threat of multi-party-ism becoming multi-ethnicity, weakened accountability and paved the way for institutionalised corruption. Finally, the centralised strategy contradicted the African experience with traditional community based governance and widened the gap between state and society.

### ***2.4 Assessment***

A general observation is that many of the impediments to development in Africa stem from the *understructuration* of the African state vis-à-vis society. For a state to pursue a developmental agenda it needs to be strong and it needs to have a sound and interactive relationship with society. The structured and interactive relationship with society is essential for a state if it wants to live up to the promise of choice and self-control, which the definition of development entails. Similarly, the equity

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<sup>13</sup> Diescho *Effects of colonialism* 79.

<sup>14</sup> Olowu *Failure of the centralised state* 22.

<sup>15</sup> Olowu *Failure of the centralised state* 22; see also Ginther *Right to development* 71.

<sup>16</sup> Ndue *Restoring legitimacy* 75.

element in the development effort requires a strong and responsive state. Redistributive intervention in the free market and the integration of sustainability in the notion of development cannot take place effectively in an environment where the relationship between society and the state is unstructured, underdeveloped and unappreciated. In sum, the state failed to establish the required interactive relationship with its residents because it was centralist, unmanageable and because it failed to utilise the contribution of civil society to development.

### 3 The role of the state

The picture that emerges from the definition of development and Africa's threshold problems to deliver development is that the main stumbling block hampering development in Africa is the continued poor integration of the state and society.<sup>17</sup> Therefore, the question that follows is: what should the role of the state be in development?

The mission of the state, in the view of proponents of a new state concept, is to guide and facilitate development, rather than directly manage it.<sup>18</sup> This goes beyond the usual choice between a *laissez faire* state and a *developmental* state. States should focus less on direct substantive support for and the organisations of specific projects and rather organise, facilitate and support the interface between public, private and community-based development initiatives. This requires an open, adaptive, accountable and responsive state. And one of the features of that state is the decentralisation of responsibilities to lower levels of government. Decentralisation has been proffered by many as an essential means to turn the tide of the erosion of democracy.<sup>19</sup> As a respected African leader said:

“...centralisation is inherently anti-development because it denies people (especially the disadvantaged who form the bulk of African society) easy access to institutions that allocate goods and services. (...) Central government can only be pretentious if it claims to have the capacity to provide and oversee development at the grassroots level. Central government should act just as a facilitator, because sustainable development can only be locally driven and supported.”<sup>20</sup>

### 4 Linking development and decentralisation through institutional principles

The next question is: *how* can decentralisation turn the tide of the disintegration of state and society? What are the preconditions or principles that arise from the definition of development, the disadvantages of or problems experienced with decentralisation and Africa's development problems?

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<sup>17</sup> Olowu *Failure of the centralised state* 24.

<sup>18</sup> Davidson *Crisis of the nation state* 5; McCartney *Disjunctures* 8.

<sup>19</sup> Bgoya and Hyden *State and crisis in Africa* 25; Diescho *Effects of colonialism* 87; Davidson *Crisis of the nation state* 1990: 9. McCartney *Disjunctures* 2.

<sup>20</sup> Museveni *Challenges in local self governance* 15.

The principles that this paper attempts to formulate are those principles that can be imbedded in a legal framework for decentralisation. It is important to recognise that the legal framework for decentralisation is but one of the many factors that determine the success of decentralised development.<sup>21</sup>

#### **4.1 Autonomy**

The principle of autonomy refers to an institutional framework for local government that assigns sufficient and real powers to a democratic local government.

In the European Charter for Local Self-Government, the member states of the Council of Europe committed themselves to this principle of local self-government which, according to the preamble -

entails the existence of local authorities endowed with democratically constituted decision-making bodies and possessing a wide degree of autonomy with regard to their responsibilities, the ways and means by which those responsibilities are exercised and the resources required for their fulfilment<sup>22</sup>

In describing the concept of local self-government, the European Charter distinguishes two critical elements, namely the democratic nature of local governments and sufficient responsibility.<sup>23</sup>

##### *4.1.1 Local democracy*

The element of choice in the definition of development entails an opportunity for people to make choices in the institutions of local government. Therefore, local government must be democratically elected. Without democracy there can be no choice.

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<sup>21</sup> Rondinelli *Decentralisation in developing countries* 52.

<sup>22</sup> European Charter of Local Self-Government, Strasbourg, 15.X.1985.

<sup>23</sup> Article 3 of the European Charter: 1. Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population. 2. This right shall be exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them. This provision shall in no way affect recourse to assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by statute. See also Daima *Emerging African democracies* 62.

The choice element also entails an opportunity to participate and be part of local government institutions.<sup>24</sup> Since one of the most critical factors, impeding development in Africa is the disintegration of state and society, the revitalisation of the relationship between the governors and the governed should form the backbone of Africa's development efforts. Decentralisation of the development effort to local government is a critical element thereof because it holds considerable promise for strengthening community participation.<sup>25</sup>

The critical assumption for the promise that local government holds for citizen participation is that citizen participation is an integral part of local government affairs. Participation by citizens from all sectors in society must be enabled and promoted not only in the institutional framework for local government and the relevant legislation, but also by the local governments themselves.<sup>26</sup> In other words, decentralisation does not automatically produce effective involvement of citizens and a responsive local government. Citizen participation must be valued and nurtured in order to ensure trust and agreement of decisions.<sup>27</sup>

#### *4.1.2 Powers*

Local government must have relevant powers. This entails a number of questions. Firstly, what does a municipality's legislative authority over its area of jurisdiction comprise of and to what extent can that authority be circumscribed by 'senior' governments? Secondly, what are the subject matters on which power is devolved to local government: are they sufficient or relevant in relation to the broader mandate of development?

#### *4.1.3 Financial autonomy*

Autonomous financial responsibility lies at the core of the concept of decentralisation.<sup>28</sup> If the ideal is to bring the element of choice in development as close as possible to the citizenry, the degree of

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<sup>24</sup> The European Charter recognises in its preamble that 'the right of citizens to participate in the conduct of public affairs is one of the democratic principles that are shared by all member States of the Council of Europe'.

<sup>25</sup> Diescho *Effects of colonialism* 87.

<sup>26</sup> Daima *Emerging African democracies* 61.

<sup>27</sup> Shah *Lessons about decentralisation* 30; McCartney *Disjunctions* 21; Steytler, De Visser and Mettler *Making Law* 25.

<sup>28</sup> Rondinelli *Decentralisation in developing countries* 48

financial autonomy of local governments will correlate with the degree of choice in development.

The first issue that arises under the banner of financial autonomy relates to the extent of a municipality's revenue generating authority. The European Charter states that at least part of local government's revenue should be derived from taxes and charges, where, importantly, the local government determines the rate.<sup>29</sup> It is submitted here that the power of local governments to mobilise and raise revenues must be real. This implies not only the devolution of the necessary revenue generating powers but also a 'critical size' of the tax base. Revenue powers without a tax base are hollow powers.<sup>30</sup>

Decentralisation should not result in the de-linking of taxing and spending responsibilities. Separating the responsibility to deliver services from the power to generate revenue creates a skewed accountability: local governments don't have to justify to the local population how the moneys were spent and a propensity for commitment to national government as opposed to the local citizenry is created.<sup>31</sup> The World Bank also proffers the link between taxing and delivery as a critical element:

The decentralisation framework must link (...) local financing and fiscal authority to the service provision responsibilities and functions of the local government - so that local politicians can bear the costs of their decisions and deliver on their promises.<sup>32</sup>

The financial authority of decentralised governments consists of both transfers from national government and the capacity to generate local revenue and access alternative sources. One of the principal reasons for the poor record of decentralisation in developing countries has been the 'mismatch' between the decentralised functional responsibilities and financial authority.<sup>33</sup>

The European Charter for Local Self-Government provides that '[l]ocal authorities' financial resources shall be commensurate with the responsibilities provided for by the constitution and the

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<sup>29</sup> Article 9(3).

<sup>30</sup> Rondinelli *Decentralisation in developing countries* 48.

<sup>31</sup> Shah *Lessons about decentralisation* 31-32; Rondinelli *Decentralisation in developing countries* 49; Financial and Fiscal Commission *Recommendations & Comments – The allocation of financial resources to national, provincial and local governments for the 1998/1999 fiscal year* 1998 at p 38.

<sup>32</sup> Worldbank 2000 HYPERLINK <http://www1.worldbank.org/publicsector/decentralization/rationale.htm> 10 October 2000.

<sup>33</sup>Rondinelli *Decentralisation in developing countries* 49.

law'.<sup>34</sup> Local government must not be burdened with duties without the concomitant resources.

## ***4.2 Intergovernmental relations***

A misconception that still surfaces in debates around decentralisation is that once effective decentralisation of power to local governments has occurred, national government's role in the local arena is minimised to attending to the most pressing issues.<sup>35</sup> Nothing can be further from the truth. The importance of linkages between central and local organizations is emphasised in nearly all studies of decentralization.<sup>36</sup>

“Even when national governments decentralize responsibilities, they often retain important policy and supervisory roles. They must create or maintain the “enabling conditions” that allow local units of administration or non-government organizations to take on more responsibilities. Central ministries often have crucial roles in promoting and sustaining decentralization by developing appropriate and effective national policies and regulations for decentralization and strengthening local institutional capacity to assume responsibility for new functions.”<sup>37</sup>

The functionality of the system of inter-governmental relations is one of the most critical success factors in the organisation of the state in general and thus in the performance of decentralisation. It was not for no reason that the most contentious part of the Constitutional Principles for the final Constitution of the Republic of South Africa related to inter-governmental relations.<sup>38</sup>

The principles of intergovernmental relations refer to an ‘institutional environment’ for local government that enables, supervises, supports and integrates the activities of local government.

### ***4.2.1 Integration***

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<sup>34</sup> Article 9(2).

<sup>35</sup> McCartney *Disjunctures* 21.

<sup>36</sup> Rondinelli *Decentralisation in developing countries* 66.

<sup>37</sup> Worldbank 2000 HYPERLINK <http://www1.worldbank.org/publicsector/decentralization/Different.htm> 10 October 2000.

<sup>38</sup> Kotzé *Local government in South Africa* 41.

Different levels of government cannot operate in isolation. The activities of local government must be aligned with the activities of senior governments. This means that local government must take policies and programmes of 'senior' governments into account but also that these 'senior' governments must taken into account the policies and programmes of local government.<sup>39</sup> The element of choice entails that the choice and preference exercised at local level must be channeled upwards through the local government unit. This principle requires horizontal and vertical integration of planning so as to achieve 'bottom up development'.

#### *4.2.2 Supervision*

The scheme of intergovernmental relations must include mechanisms for supervision of local governments. Senior governments must be able to impose their will on local governments if the national development agenda is under threat due to the actions or inactions of a local government.

#### *4.2.3 Asymmetrical powers*

Another misconception is that strong and capable local government with well-trained officials is the most obvious and important precondition for successful decentralisation.<sup>40</sup> Most authors on decentralisation do not agree and this view is not necessarily supported by experience. For example, with the introduction of the Resistance Council system, a decentralised district council system, in Uganda, Yoweri Museveni's government faced a frightening lack of capacity at district and subdistrict level. The choice was between, on the one hand, delaying the implementation of the decentralisation programme in order to first develop capacity at those levels and proceeding with the changes on the other hand. The second choice was opted for, because "[I]t was evident to us that to argue for delayed action until everybody's and every institution's capacity had been enhanced and made ready would be to argue for a static situation." The resulting experience in Uganda was that the capacity increased each year 'from the heat of the implementation'.<sup>41</sup>

Lack of institutional capacity should not form a barrier to decentralisation. Holding back decentralisation for as long as one 'standard' level of capacity is absent, amounts to condemning the

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<sup>39</sup> De Visser, Steytler and Mettler *Systems Bill* 14.

<sup>40</sup> Marais *Challenges for local government* 41.

<sup>41</sup> Museveni *Challenges in local self-government* 16.

institutional transformation to a standstill.

The legal and regulatory framework should (...) be designed to recognize differences in management capacity (...) Matching degree of autonomy and privileges to a set of performance indicators (...) would allow the legal and regulatory framework to adjust for changes in local capacity.”<sup>42</sup>

A differentiated approach to decentralisation facilitates a controlled development of capacity at local level and is therefore preferred.<sup>43</sup> The existing capacity of subnational administrations should be a leading benchmark in the decision as to what powers are to be decentralised to which local governments.<sup>44</sup>

#### *4.2.3 Support*

Institutional capacity at local government level is not a precondition for decentralisation. The corollary of this argument is that there is an obligation on senior governments to strengthen the capacity of local governments.

### **4.3 Redistribution**

#### *4.3.1 Geographic redistribution*

One of the problems or ‘dangers’ of decentralisation relates to regional inequity<sup>45</sup> and the stimulating effect that decentralisation may have on aggravating unequal distribution of resources between regions. This emphasises the importance of the use of intergovernmental transfers in a redistributive way.<sup>46</sup> The method used for the determination of intergovernmental transfers should take the poverty factor into account.

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<sup>42</sup> Worldbank 2000 HYPERLINK <http://www1.worldbank.org/publicsector/ decentralization/constitutional.htm> 10 October 2000.

<sup>43</sup> Shah *Lessons about decentralisation* 31; Bhabha *Role of the National Council of Provinces* 17.

<sup>44</sup> Worldbank 2000 HYPERLINK <http://www1.worldbank.org/ publicsector decentralization/issue1.htm> 10 October 2000; Rondinelli *Decentralisation in developing countries* 69.

<sup>45</sup> Prud’Homme *Dangers of decentralisation* 18.

<sup>46</sup> Financial and Fiscal Commission, *Recommendations & Comments – The allocation of financial resources to national, provincial and local governments for the 1998/1999 fiscal year* 1998 at p39.

#### ***4.4 Conflicts between the principles***

It is evident that the principles are not necessarily harmonious with one another. Tensions between the various principles are inevitable.

##### *4.4.1 Local autonomy and supervision*

The principle of supervision conflicts with the autonomy principle. The autonomy principle also entails that local governments should be allowed to make, and learn from mistakes. The institutional framework for local government needs to strike a careful balance between the need to maintain the national development agenda and the need to maintain a sufficient degree of local autonomy. The answer lies in restraint, exhaustion of all other remedies and checks and balances on the exercise of the supervisory power.

##### *4.4.2. Financial autonomy and democracy*

In general, the size of the municipality will enhance the quality of the tax base and introduce the benefit of economies of scale. However, tension arises with the democratic principle since participation is threatened by the large size of the local government. This tension is not insurmountable but emphasises the need for the strengthening of participatory policies and structures (decentralisation within the municipality) taking into account sizes and distances within the municipality.

##### *4.4.3 Financial autonomy and geographic redistribution*

The call for distributive intergovernmental transfers can be interpreted as in conflict with the financial autonomy of a local government. A move towards financial dependency would indeed be evidence of a conflict. The conditionality of the intergovernmental transfer is critical. The degree to which the conditions attached to the intergovernmental transfer prescribe to local government what it should or should not do will determine whether or not there is a real conflict.

## 5 Developmental principles in the Constitution

Turning to the institutional framework for local government in the South African Constitution, the concept of ‘developmental local government’ finds its constitutional basis mainly in two sections of the Constitution: section 152 and 153.

### Objects of local government

152. (1) The objects of local government are-
- (a) to provide democratic and accountable government for local communities;
  - (b) to ensure the provision of services to communities in a sustainable manner;
  - (c) to promote social and economic development;
  - (d) to promote a safe and healthy environment; and
  - (e) to encourage the involvement of communities and community organizations in the matters of local government.
- (2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

### Developmental duties

153. A municipality must-
- (a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
  - (b) participate in national and provincial development programmes.

What is the meaning of these two provisions and what is their relation to the definition of development? It is submitted that the two provisions in the Constitution, outlining the envisaged developmental role of local government, centre around four developmental principles.

#### *5.1 Democracy*

Both sections 152(1)(a) and (e) are informed by the establishment of a democratic dispensation for local government, which rests on the concepts of representation, accountability and people-centred governance. The involvement of communities and community organisations in local government as

well as the onus on local governments to encourage and facilitate such involvement is part of this democracy. This element of developmental local government relates the element of ‘choice’ that is part of the definition of development. Representation entails, amongst other things, that people have a choice in electing their public representatives. The object of local government to encourage public participation is aimed at significantly enlarging that choice by making communities and individuals’ part of decision making processes. Accountability means that people can demand explanations and have the right to be given answers about local government plans, policies and actions or a lack thereof so as to enlarge their choice and say in local government affairs.<sup>47</sup>

### *5.2 Sustaining and improving standard of living*

Subsection 152(1)(b) instructs local government to ensure sustainable service delivery – *sustainable* service delivery means delivery in such a manner that the consumer can afford them and the supplier can provide them within its own means on an ongoing basis.<sup>48</sup> A continued, sustainable and improving delivery of services such as water, sanitation, electricity, refuse removal and municipal health are inextricably linked to the standard of living. In speaking of the promotion of social and economic development, subsection 152(1)(c) recognises that the improvement of a standard of living through delivery of government services and through self-empowerment (employment, social upliftment) is dependent upon a productive local economy and improved social conditions. In the same vein, section 153(a) translates the objects of local government in a duty on municipalities to promote their social and economic development. Further, section 153(a) instructs municipalities to prioritise their communities’ basic needs. Basic needs, such as access to water, health care and housing relate directly to standards of living and their prioritisation is to result in the improvement thereof. This developmental principle relates to all three elements of the definition of development. The principle of sustaining and improving a standard of living incorporates the enlargement of choices through empowerment, the improvement of economic conditions as well as the fair distribution of the benefits of that economic improvement.

### *5.3 Safe and healthy environment*

Subsection 152(1)(d) incorporates two notions, namely a safe environment, related to issues of security (crime prevention, traffic safety) and a healthy environment. The latter notion makes clear

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<sup>47</sup> See Steytler, De Visser and Mettler *Making Law* 25.

<sup>48</sup> See Steytler, De Visser and Mettler *Making Law* 26.

that development must take place in an environmentally sustainable manner. The positive way it is phrased, however, indicates not only that the environment cannot be summarily placed at the altar of development but also that the improvement of the environment is part of the development mandate. The same applies to the notion of a safe environment, which must not be harmed by development efforts and must be a priority in development initiatives. The principle of a safe and healthy environment relates to the improvement and maintenance for future generations of a standard of living.

#### *5.4 Co-operative government*

The Constitution accords local government a distinct developmental role, which places it under a duty to contribute to the overall development objectives of the government in the interests of the entire population and with significant emphasis on the poor majority. Section 153(b) of the Constitution makes it clear that local government no longer operates in the interests of particular minority constituencies but is part of a broad national development agenda.<sup>49</sup> A second rationale for the duty to participate in national and provincial development programmes is based on the notion that the experiences of people on the ground should inform development programmes not only at local but also at provincial and national level. Local government should feed into national and provincial government the particular needs faced by individual communities.<sup>50</sup> Co-operative government, which is essentially the focal point of 153(b), ensures that national and provincial policy informs local policies and that local needs inform national and provincial policy.<sup>51</sup>

In that sense, the principle of co-operative government deals directly with the element of choice in the definition of development. The will of the people as a whole, which manifests itself - through national elections - in a national government, must influence and sustain the development efforts of a municipality. And vice versa, the will of the people as a community, which manifests itself - through local elections - in a local government, must influence and sustain the development efforts of national government.

#### *5.5 Assessment*

The aspirations of these developmental principles coincide with most the institutional principles

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<sup>49</sup> Murray *Butterworth intervention* 351.

<sup>50</sup> Babha *Role of the National Council of Provinces* 18.

<sup>51</sup> De Visser, Steyter and Mettler *Systems Bill* 14.

formulated under 4. The next question, however, is to what extent the implementation of these aspirations in other constitutional provisions and framework legislation on local government are consistent with these principles.

## **6 The autonomy principle in ‘developmental local government’**

This contribution will only evaluate the South African institutional framework against the institutional principle of autonomy. The scope of this paper does not allow for a full examination of the local government framework against all three principles. This evaluation will be discussed along following themes, identified in paragraph 4.1, namely local democracy, powers and financial autonomy.

### ***6.1 Local democracy***

One of the most significant features of local government’s institutional status is the decentralised representation of voters, which establishes the principle of local decision making by locally elected representatives. Municipal councils are required to operate as full-blown forums for the democratic representation of their electorates. The Constitution requires ‘democratic government’ which ensures ‘accountability, responsiveness and openness’ to be realised as much in the representative bodies of provinces and municipalities as in the national parliament.<sup>52</sup> The electoral system for local government is mixture of constituency and proportional representation and represents a unique approach to balancing the act between individual accountability of councillors and party political representation.<sup>53</sup>

### ***6.2 Powers***

The judgement, delivered by the Constitutional Court on 14 October 1998 in the case of *Fedsure v Greater Johannesburg Transitional Metropolitan Council*<sup>54</sup> forms the bedrock of any analysis of local government’s powers. In this case, the Constitutional Court made an unequivocal statement as to

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<sup>52</sup> Section 1 of the Constitution; see Murray *Butterworth*: 340 and 360.

<sup>53</sup> De Visser *Electing councillors* 8.

<sup>54</sup> *Fedsure Life Assurance and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998(12) BCLR 1458 (CC).

the status of local government in the post-1994 constitutional framework.

### *6.2.1 The status of municipal legislation after 1994*

The interim Constitution did away with the supremacy of Parliament: its legislation, and the legislation of all organs of State, is now subject to constitutional control. The interim Constitution further recognises and makes provision for three levels of government that derive their powers from the Constitution. The constitutional status of a municipality is thus materially different from what it was when Parliament was supreme. Under the parliamentary sovereignty, the institution of elected local government could have been terminated at any time by the central or provincial governments. In *Fedsure*, the Constitutional Court made it clear that “local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself.”<sup>55</sup>

Thus, the Court concluded that the enactment of legislation by an elected local council acting in accordance with the Constitution, is a legislative and not an administrative act. It is not subject to challenge by “every person” affected by them on the grounds, pertaining to administrative justice.

Two interrelated themes that constitute the stark difference in status of municipal legislation compared to the pre-1994 dispensation can be identified:

- the institution of local government as a sphere of government and the powers of municipalities are recognised and protected in the Constitution; and
- the exercise of municipal legislative power is no longer a delegated function, subject to judicial and administrative review, but a political process, influenced by the considerations and input of elected councillors, representing the will of the municipal residents.

### *6.2.2 A closer look at local government’s legislative powers*

The primary source of power for local government in the Constitution is section 156(1)(a), which 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*. Local government derives powers from the Constitution itself; it has original powers, listed in Schedule 4B

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<sup>55</sup> *Fedsure* at para 26.

and Schedule 5B of the Constitution.<sup>56</sup> The obvious significance of this lies in the fact that the ‘core’ functions of local government cannot be removed or amended by ordinary statutes or provincial acts. These functions cannot be changed but for an amendment to the Constitution itself. This is probably the most critical and fundamental feature of local government’s institutional integrity.

The secondary source of power for local government is section 156(1)(b), which provides that a municipality has executive authority in respect of, and has the right to administer *any other matter assigned to it by national or provincial legislation*. The tertiary source of power for local governments is the assignment to *individual municipalities*.

In sum, there are three sources of power for local government;

- the competencies, listed in Schedule 4B and Schedule 5B;
- general assignments in terms of section 156(1)(b) by national or provincial legislation; and
- individual assignments in terms of section 44(1)(a)(iii), 104(1)(c), 99 or 126.

### 6.2.3 Legislative powers of other spheres on local government’s ‘original powers’

The Constitution does not allocate the matters in Schedule 4B and 5B *exclusively* to local government. National and provincial government can also regulate on those matters. In fact, they have the authority to ensure that municipalities perform these matters adequately. This means that interference by national and provincial government in Schedule 4B and 5B matters is not only constitutionally permitted but also mandated in terms of their oversight role.

From the point of view of local government autonomy, it is important to assess *the degree* to which other spheres of government can interfere in local government’s legislative powers. The system of legislative powers and the principles that determine which law prevails in the event of inconsistency is a key indicator of local government autonomy.

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<sup>56</sup> Section 156(1) of the Constitution: “A municipality has executive authority in respect of, and has the right to administer ...the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5.” See *Debates of the Constitutional Assembly* 256 (ANC MP Mr M Bhabha), 259 (ANC MP Ms M Verwoerd), 273 (FF MP Mr P J Groenewald) and 279 (DP MP Mr K M Andrew).

## Overrides

Section 156(3) determines that a by-law that conflicts with national or provincial legislation is invalid. It is submitted that the approach to this enquiry consists of four questions.

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

1 Is there national or provincial legislation on the matter that is dealt with in this by-law?

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

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

Obviously if a by-law does not conflict with national or provincial legislation, the override does not enter the equation and the by-law is valid. The question as to whether or not a by-law conflicts with other legislation is not always easy to answer. It is suggested that the question as to whether or not there is conflict should be answered from a point of view of implementation and enforcement. There is no conflict if it is possible to implement and enforce both regulations with regard to the same matrix of events without difficulty. If the enforcement of both regulations is problematic, an inconsistency exists and the enquiry proceeds to the third question.

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

The Constitution does not give blanket regulatory power on Schedule 4B and 5B matters to national and provincial government. For national or provincial legislation to survive the test set out in the third question, it must be enacted by national or provincial governments *within their legislative competency*. This legislative competency of national and provincial governments is determined by two factors:

- whether it is national legislation or provincial legislation; and
- the *location* of the functional area - in other words, whether the functional area is a Schedule

4B or a Schedule 5B matter.<sup>57</sup>

Provincial government's legislative power over local government matters

Provincial government has regulatory powers over Schedule 4B and 5B matters - these cannot be prescriptive with regard to the 'core' of Schedule 4B or 5B matters but are limited to the setting of a legal framework, which includes minimum standards and monitoring.<sup>58</sup>

National government's legislative powers over local government matters

National government has a general, all encompassing power to legislate on Schedule 4B matters. National government has general legislative powers over Schedule 5B matters, restricted to the grounds of section 44(2) and the 'necessity requirement' in that provision.<sup>59</sup>

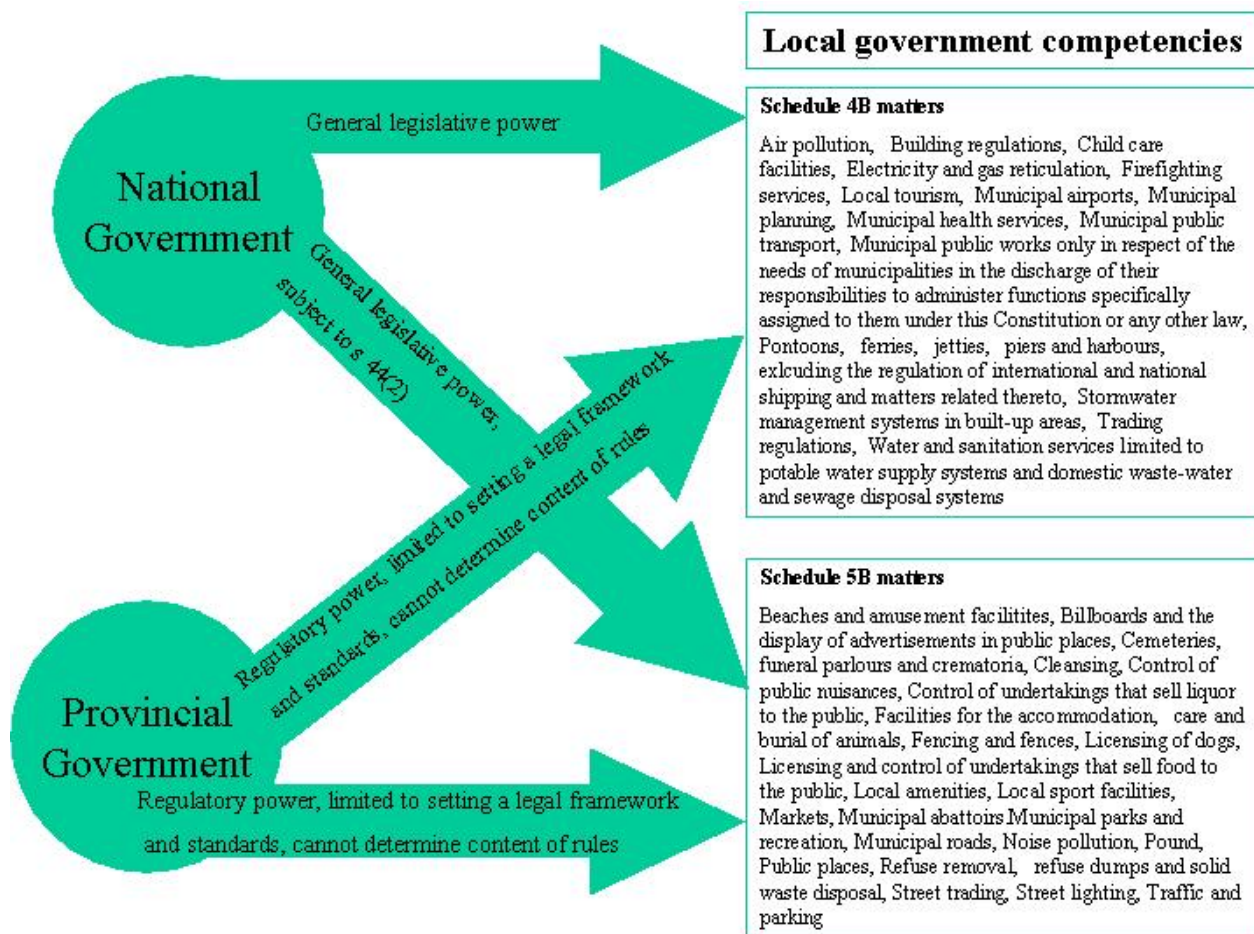
The diagram below illustrates the legislative powers of national and provincial governments on local government matters.

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<sup>57</sup> For a more elaborate outline of national and provincial governments' legislative powers over local government matters, see Steytler, De Visser and Mettler *Making Law* 17; Mettler *Legislative powers*.

<sup>58</sup> Steytler, De Visser and Mettler *Making Law* 19-20.

<sup>59</sup> Steytler, De Visser and Mettler *Making Law* 18-20.



If, on the basis of these questions, the national or provincial law is deemed to be enacted within the relevant sphere’s powers, the enquiry proceeds to the last question.

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

Section 151(4) establishes a principle that underpins all relationships between local government and other spheres of government including those discussed above. It provides that “...national or provincial government may not compromise or impede a municipality’s ability or right to exercise its powers or perform its functions”.<sup>60</sup> The requirement of section 151(4) is different from the question as to whether or not the national or provincial government was competent (the third question).

<sup>60</sup> Babha remarks that 151(4) “ensures that any obstructive behaviour on the part of provincial and national government will not be tolerated”. See Bhabha *Role of the National Council of Provinces* 16.

After it has been determined that national or provincial government has the power to make these laws, section 151(4) deals with *the way in which the power is exercised*.

For example, when a provincial act in terms of section 155(7) on a Schedule 4B matter amounts to more than ‘regulation’, it will simply be invalid because provincial government legislates outside of its competency. However, even when the act does not amount to more than ‘regulation’, but the *way* in which the power is exercised constitutes an impediment; it will also be invalid for it falls foul of section 151(4) of the Constitution. The exercise by national government of its general powers in terms section 44(1)(a)(ii) or 44(2) can be challenged if it constitutes an ‘impediment’ or a ‘compromise’ in terms of section 151(4) and can consequently be invalid.

### ***6.3 Financial autonomy***

The issue of financial autonomy centres around two issues: local government’s revenue generating authority and the prevention of a ‘mismatch’ between responsibilities and available funds.

#### *6.3.1 Revenue generating authority*

Section 229 of the Constitution entrenches local government’s revenue generating powers, namely the property rates and surcharges on fees for services provided by or on behalf of the municipality. The entrenching of these powers in the Constitution is important, since it protects other spheres from removing local government’s fiscal powers at will. The recent developments around the electricity distribution (one of local government’s main income sources) being taken over by Regional Electricity Distributors (REDs), in which local government would keep shares, is reason for concern from this point of view.<sup>61</sup>

#### *6.3.2 Protection against unfunded mandates*

The prevention of a mismatch between functions and resources, comes to the fore, especially around the assignment of functions to local government.

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<sup>61</sup> Reforms ‘ignore’ local governments *Business Day* (18 June 2001); Cape city council to fight electricity plan *Business Day* (1 June 2001); New law to avert challenges to electricity restructuring *Business Day* (11 July 2001).

## Assignment

The constitutional provisions in connection with the assignments to individual municipalities can be found in sections 44(1)(a)(iii) and 104(1)(c) and in sections 99, 16 and 156(4).

- Sections 44(1)(a)(iii) and 104(1)(c) confer on Parliament and the provincial legislatures the power to assign any of their legislative powers to a municipal council.
- Section 99 provides that a member of the national Cabinet can assign a matter that is to be exercised in terms of national legislation to a municipal council.
- Section 126 provides the same for a member of the provincial Cabinet who can assign a matter that is to be exercised in terms of national or provincial legislation to a council.
- Further, section 156(4) of the Constitution makes assignment by agreement 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.

The legal regime for assignments is further elaborated on in Chapter 3 of the Systems Act.<sup>62</sup> In section 9 and 10, the Act distinguishes between assignments to municipalities generally and assignments to specific municipalities. These two sections render the assignments subject to *procedural* (consultation and publication) requirements 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 prior to assignment. 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 guarantees for adequate protection against unfunded mandates. The effectiveness of this protection will depend on, *inter alia*, -

1. the degree to which the organ of state that initiates the assignment takes serious the consultation and the arguments proffered by the agencies that are to be consulted. For example, how much time will be allowed for preparing input, at what stage of the preparation process are the various agencies involved, do they have real input or will they be faced with *faites accompli*?

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<sup>62</sup> Local Government: Municipal Systems Act 32 of 2000.

2. 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 but doubts have been raised as to its ability to fulfill its mandate of advocating local government's interest.<sup>63</sup>

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.<sup>64</sup>

## 7 Assessment

It is fair to say that the principle of autonomy for local government has, to a very large degree, been incorporated in the legal framework for local government. Firstly, the democratic nature of local governments is entrenched in section 157 of the Constitution.

### 7.1 *Relevant powers?*

Local government has been afforded a set of 'core' competencies in the Constitution itself. An area of discontent with the powers of local government arises from the location of 'housing' as a legislative competency, held concurrently by national and provincial government. No doubt, housing is the core of people's development. The notion of development as a process of enlarging people's choices, standard of living and access to resources centres around housing. Most of local government's competencies are peripheral to housing, which, according to the Constitutional Court,

...entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these,

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<sup>63</sup>Salga decides on critical look at itself *Business Day* (12 June 2001).

<sup>64</sup> Ss 154(1) and 155(6) of the Constitution.

including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, and there must be a dwelling.<sup>65</sup>

The effect of housing being a Schedule 4A matter is that priorities are set at national and provincial level. Housing delivery by local government takes place on the basis of subsidy applications to provincial governments who judge these applications against their standards. The question then arises, whether a truly ‘developmental’ municipality should not be empowered to set its own priorities when it comes to facilitating people’s access to the most fundamental aspect of development.

### ***7.2 Financial autonomy***

With regard to the third element under the autonomy principle, namely financial autonomy, it can be said that local government has a substantial revenue generating power in terms of the Constitution. However, there are two concerns around this. Inasmuch that it is true that the legal power to raise revenue is real and entrenched in the Constitution, in many areas it is currently a hollow power. Rural local government can be characterised as having a ‘flimsy’ and sometimes even non-existent tax base.<sup>66</sup> Secondly, the imminent electricity restructuring poses a real threat to local governments’ fiscal autonomy: to replace the direct income out of surcharges on electricity fees, which is responsible for a large portion of municipal revenue, with a transfer out of central funds will inevitably reduce local government’s autonomy.

The protection against unfunded mandates has been built into the legal framework, which is a novel and important feature of the institutional scheme for local government. However, it is early days to speculate on their effectiveness and the value of these provisions will depend on the stakeholders’ commitment to effective local government.

### ***7.3 Protection of local government powers***

National and provincial governments can also makes laws on local government’s competencies. However, they have to stay within their respective competencies and in any event cannot regulate in

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<sup>65</sup> *Government of the Republic of South Africa and others v Irene Grootboom and others* 2000 (11) BCLR 1169 at para 35.

<sup>66</sup> ‘Nothing easy about municipal finance’ *Business Day* (11 October 2001)

a manner that negates the status of local government. The importance of this protection of local government's legislative powers in the Constitution should not be underestimated. From the perspective of decentralised development it is critical for local government to have a legal space to operate in without undue interference by other levels of government.

It is only when local government is afforded substantial regulatory powers that the notion of development, driven at local level, can really take root. Local government must be allowed to govern, make mistakes, learn from its mistakes and, importantly, establish a sound and interactive relationship with its citizenry. A local sphere that is treated as the stepchild of other spheres of government through continuous legislative intervention will never be able to live up to its developmental mandate.

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